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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOSEPH ALBERICI,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Whether, in the absence of any other direct or circumstantial evidence, evidence of a business' mailing customs is sufficient to prove "use of the mails" for purposes of the Mail Fraud Statute (18 U.S.C. §1341), where such evidence consists of no more than the testimony of a business executive concerning what he understands the mailing practice in his office to be.

II. Whether the failure of trial counsel to investigate critical and potentially helpful sources of information, and the refusal of trial counsel to request an "accomplice instruction" where the only direct evidence of Petitioner's involvement in an arson was the testimony of an alleged accomplice, constituted serious ineffectiveness of counsel, and whether the court of appeals erred in finding such negligence to be a permissible trial tactic.

III. Whether the district court's reinstatement of the verdict on count five of the indictment, and the affirmance of that decision by the court of appeals, was error where, as a result of the Government's proof and the trial court's instructions to the jury, an element of the offense upon which Petitioner was convicted differed from that with which the grand jury charged him.

IV. Whether the district court, affirmed on appeal, erred in permitting the Government to use the admitted guilt of its witnesses as evidence of Petitioner's guilt and in failing to give a cautionary instruction in that regard.

V. Whether the alleged mailing underlying Petitioner's conviction was related to the scheme to defraud charged in the indictment under the circumstances of this case.

PARTIES TO THE PROCEEDING

The caption of the case contains the names of the parties to the proceeding in this Court.

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CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATUTORY PROVISIONS INVOLVED

The United States Code, Act of June 25, 1948, C. 645, 62 Stat. 763; May 24, 1949, C. 139 §34, 63 Stat. 94, *18 U.S.C. §1341*, provides as follows:

> "§1341. Frauds and swindles. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JOSEPH ALBERICI,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

A copy of the Judgment and Commitment Order of the United States District Court for the Eastern District of Pennsylvania, dated November 9, 1983, is contained in Appendix A. Appendix B contains a Bench Opinion of the district court dated July 25, 1983 and filed August 4, 1983, vacating the guilty verdicts on all counts of the indictment, and is accompanied by an Order dated and filed July 27, 1983, granting Petitioner's motion for a

new trial. A Memorandum of the district court, dated September 2, 1983, reinstated the verdict on count five of the indictment and is contained in Appendix C. The Memorandum and Opinion of the United States Court of Appeals for the Third Circuit, dated and filed on May 15, 1984, is contained in Appendix D. The Order of the court of appeals denying Petitioner's petition for rehearing *in banc* is dated and filed on June 14, 1984 and is provided in Appendix E. These Opinions and Orders are unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered and dated on May 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This is a Petition for Certiorari arising from the following facts. On January 19, 1983, Petitioner was found guilty in the United States District Court for the Eastern District of Pennsylvania, after a jury trial, of six counts of mail fraud in violation of 18 U.S.C. §1341. The basis for federal jurisdiction in the United States Court of Appeals was 28 U.S.C. §1291.

On July 25, 1983, following an evidentiary hearing on Petitioner's Motion for New Trial, the district court vacated the convictions on all six counts of the indictment and ordered a new trial because the instructions given to the jury on the elements of mail fraud varied so substantially from what the grand jury charged in the indictment, that a new trial was required. (App. B, 6-26). On September 2, 1983, however, the district court reinstated the conviction on count five of the indictment, accepting the Government's contention that any error committed was harmless beyond a reasonable doubt. (App. C).

Petitioner was sentenced on November 9, 1983 to a twenty (20) month term of incarceration pursuant to 18 U.S.C. §4205(b)(2), from which he appealed. On May 15, 1984, the United States Court of Appeals for the Third Circuit affirmed the conviction. (App. A). A Petition for Rehearing was denied on June 14, 1984. (App. E).

The narrative of events leading to this Petition begins in May of 1977 when Petitioner entered into an agreement of sale to purchase from John D'Ambro, the long defunct Jerry Lewis Theatre in Aston, Pennsylvania, which Petitioner planned to convert into a catering business or restaurant for his son. The building had been vacant since 1973 and D'Ambro allowed the $300,000 in fire insurance to lapse in 1974. (T. 1/5/83, 24-27).[1] The parties agreed to a purchase price of $210,000, although the building was worth at least $300,000 (T. 1/5/83, 5) and settlement was scheduled for August 10, 1977. (T. 1/5/83, 69).

D'Ambro real estate agent, Richard May, advised Petitioner that he should obtain fire insurance because Petitioner would be required to go to settlement even if something happened to the building before then. (T. 1/5/83, 77-72, 107-110). Petitioner contacted his insurance agent, Leonard Triggiani, who confirmed the necessity of obtaining insurance and obtained a three month binder with Safeguard Insurance Company for $100,000 which would expire in mid-August. He also obtained two additional one year policies of $100,000 with the Pennsylvania Fair Plan and of $125,000 with General Accident Insurance Company. (T. 1/5/83, 172-179). Triggiani also obtained insurance on the contents of the building for $25,000. (T. 1/5/83, 177-178).

Petitioner intended to let the three month Safeguard binder expire, and Triggiani suggested that Peti-

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1. T. refers to the transcripts of trial and is followed by the date and page number.

tioner look to another agent for additional insurance because it would be difficult for Triggiani to place any more insurance on the building (T. 1/17/83, 42-44). Accordingly, Petitioner contacted insurance broker John Meehan and requested a $100,000 policy. Meehan, however, placed two policies of $62,500 on the building and $12,500 on contents which Petitioner accepted because they were cheaper than the $100,000 Safeguard policy. (T. 1/5/83, 207-211, 1/17/83, 47). Thus, from the end of July to mid-August of 1977, when the Safeguard binder would expire, there was $450,000 in fire insurance on the building and $50,000 on its contents.

On August 6, 1977, four days before the scheduled settlement, the Jerry Lewis Theatre caught fire. It was quickly determined that the fire was a result of arson. (T. 1/10/83, 168-175). Petitioner appeared at settlement on August 10, 1977 but requested a postponement due to the fire. The parties eventually settled on August 24, 1977. (T. 1/5/83, 52-55, 76-82).

Petitioner submitted claims of loss to the insurance companies as a result of the fire several months after the time required for submission of proofs of loss, and only after being approached by Bertram Horowitz, a public insurance adjuster who testified that untimely submission of claims created a legal defense for the insurance companies. (T. 1/10/83, 193-194). Nevertheless, the Government contended that the Petitioner had schemed to defraud the insurance companies of money by arranging the arson and, in furtherance of that scheme, caused certain documents to be delivered through the mails to the insurance companies and their agents. (T. 1/5/83, 2-12). The foregoing scenario of events resulted in a six count indictment charging Petitioner with mail fraud under 18 U.S.C. §1341.

At trial, the Government offered the testimony of self-proclaimed arsonists Joseph DiTizio, Charles Allen, and Vincent Fardella to prove its case against Petitioner. DiTizio was the Government's only direct evidence of

Petitioner's alleged involvement in the arson. He testified that his brother Henry had introduced him to Petitioner at a political fund-raiser in 1974 or 1975. (T. 1/5/83, 230-232). DiTizio testified that in July of 1977, Petitioner contacted him, and at a subsequent meeting said that he had purchased a theatre which he wanted to have burned. (T. 1/5/83, 232-234). DiTizio contacted Allen, who in turn enlisted Fardella to help in the arson. (T. 1/5/83, 234-236). After several trips to the theatre, DiTizio and Allen went there on August 6, 1977 and set it on fire, leaving behind a 55 gallon drum and other items obviously related to arson. Allen and Fardella testified about their respective roles in the arson, but had never met or heard of Petitioner. These witnesses also testified that they had pled guilty to the Jerry Lewis Theatre arson and described the terms of their agreements with the Government.

The Government's only evidence on use of the mails was the testimony of Bertram Horowitz, the insurance adjuster, who prepared a letter of estimated damages to Curley Adjustment Company on January 23, 1978 in order to clarify a discrepancy between an estimate given by Curley's contractor and the estimate given by the contractor working for Horowitz' firm. That letter is the basis of the count five conviction herein. In response to the prosecutor's question "Sir, in August of 1977, the normal course of business of your office was to mail these documents, is that correct?", Horowitz answered "Yes." (T. 1/10/83, 192). This was the entirety of the Government's proof of mailing on count five of the indictment. (App. F).

Petitioner presented sixteen character witnesses who testified to his excellent reputation as an honest and law-abiding citizen, and Petitioner took the stand in his own defense, denying any involvement in the arson plot.

During the Government's closing argument, over Petitioner's objection, the prosecution contended, in essence, that the co-defendants' guilty pleas indirectly

constituted evidence of defendant's guilt. (T. 1/18/83, 68-70).

Petitioner was found guilty on all six counts of mail fraud, but the verdicts were vacated after a hearing on Petitioner's motion for a new trial, because the trial court's instructions to the jury amounted to a constructive amendment of the indictment. The court declined to decide Petitioner's additional contention that he had been denied effective assistance of counsel as a result of trial counsel's failure to investigate critical sources of potentially helpful information, as well as counsel's rejection of an accomplice instruction. (App. B, 1-6). The district court later reinstated the verdict on count five of the indictment, leading ultimately to this Petition.

I. There Is Conflict Within The Third Circuit And Among Other Federal Courts Concerning An Important Question Of Federal Law Which Has Not Been, But Should Be, Resolved By This Court

As mentioned in the Statement of the Case, *supra*, the sole document upon which the present conviction rests is a letter of estimated damages prepared on January 23, 1978 by Bertram Horowitz, a public adjuster with Young Adjustment Company, on behalf of Petitioner. The letter was addressed to a claims adjuster for Curley Adjustment Company and was stamped "received, January 24, 1978" by the adjustment company.

The only "evidence" offered by the Government to prove that this letter was mailed, was the testimony of Horowitz that in *August of 1977*, such documents were normally mailed in the ordinary course of business. (The entirety of the Government's evidene on use of the mails is contained in Appendix F for the Court's convenience.) The document, however, was not prepared until late *January of 1978*, and Petitioner argued that the failure of the Government to present *any* evidence of business practices during the critical period of January 1978

rendered such evidence insufficient as a matter of law to raise an inference of mailing under *United States v. Hart*, 693 F.2d 286 (3d Cir. 1982). The United States Court of Appeals for the Third Circuit affirmed, stating simply that the jury could infer mailing from business custom testimony. (App. D).

Petitioner respectfully submits that the Government's evidence of mailing was patently insufficient for a number of reasons to be discussed herein, that the decision of the court of appeals below is in conflict with its earlier decisions on the same issue, and that federal courts are in conflict with each other on the question of what type of "business custom" evidence must exist before it is sufficient in itself to raise an inference of mailing.

It is beyond dispute that "use of the mails" for the purpose of executing a scheme to defraud is an element of the Mail Fraud Statute (18 U.S.C. §1341) which the Government must prove beyond a reasonable doubt. *See*, e.g., *United States v. Freeman*, 619 F.2d 1112 (5th Cir. 1980), *cert. denied*, 450 U.S. 910 (1981); *United States v. Azzarelli Construction Company*, 612 F.2d 292 (7th Cir. 1979), *cert. denied*, 447 U.S. 920 (1980), *United States v. Murr*, 681 F.2d 246 (4th Cir.), *cert. denied*, 103 S.Ct. 307 (1982); *United States v. Reid*, 533 F.2d 1255 (D.C. Cir. 1976); *United States v. Boyd*, 606 F.2d 792 (8th Cir. 1979).

It is also agreed that use of the mails may be proven by circumstantial evidence, such as "business customs," provided that such circumstances are themselves proved and "directly support an inference of the (ultimate) fact and exclude all reasonable doubt concerning its existence." *United States v. Berg*, 144 F.2d 173, 174-175 (3d Cir. 1944); *Mackett v. United States*, 90 F.2d 462, 464 (7th Cir. 1937).

Beyond this point, however, the Circuits are hopelessly split on the question of when such evidence is sufficient to give rise to the inference of mailing. Petitioner

respectfully submits that the time has come for this Court to examine the conflict in the context of the case at bar in order to determine *what constitutes sufficient evidence of mailing for purposes of mail fraud where the Government's only proof consists of business custom testimony.*

The Circuits are basically split into two factions with the Third, Fourth and Eighth Circuits subjecting such evidence to a "strict standard" of probative value where it is all the Government has to offer on use of the mails, and the Fifth, Seventh and Ninth Circuits applying a much more liberal standard under identical circumstances. *Compare, United States v. Wolfson,* 322 F. Supp. 798 (D. Del. 1971), *aff'd,* 454 F.2d 60 (3d Cir.), *cert. denied,* 406 U.S. 924 (1972); *United States v. Sinclair,* 433 F. Supp. 1180 (D. Del.), *aff'd,* 566 F.2d 1171 (3d Cir. 1977); *United States v. Ellicott,* 336 F.2d 868 (4th Cir. 1964); *United States v. Minkin,* 504 F.2d 350 (8th Cir. 1974), *cert. denied,* 420 U.S. 926 (1975) *with United States v. Joyce,* 499 F.2d 9 (7th Cir.), *cert. denied,* 419 U.S. 1031 (1974); *Stevens v. United States,* 306 F.2d 834 (5th Cir. 1962); *United States v. Brackenridge,* 590 F.2d 810 (9th Cir.) *cert. denied,* 440 U.S. 985 (1979).

The "strict standard" first emerged in *United States ex rel Helmecke v. Rice,* 281 F. 326 (S.D. Tex. 1922). In that case, the defendant was court martialed for desertion of the military. His defense was that he had never been informed of his induction. The Government's only evidence that the defendant was so informed was the testimony of the Adjunct General who stated that it was the "careful custom" of his office to mail the original notice to the person named therein, and retain a copy for the file. This witness was not himself responsible for depositing such documents in the mail and had no personal knowledge of the mailing, but based his testimony entirely upon the normal custom and practice of his office as he understood it. *Id.* at 328.

The district court found such evidence legally insufficient and held that when the mailing of a document is the key factor in a case, the mere testimony that it is the usual custom or practice of an office to mail such documents, is insufficient to support an inference of mailing:

> "The ruling principle is that the fact of mailing, where that fact is an important one, must be proven, like any other fact, by direct or circumstantial evidence, and that, *where there is no direct evidence of mailing, it is not sufficient proof of mailing to offer testimony merely that the general custom of an office was to mail all letters and notices.*" *Id.* at 331. (Emphasis added).

The court then set out a two-step standard of sufficiency as follows:

> "The better rule, and that which seems to be established by the weight of authority, is that in the absence of direct evidence, there must be proof of an *invariable custom* or usage in an office of depositing mail in a certain receptacle, that the letter in question was deposited in such receptacle *and, in addition,* there must be testimony of an employee whose duty it was to deposit the mail in the post office, that he either actually deposited that mail in the post office, or that it was his invariable custom to deposit every letter left in the usual receptacle and that he never failed in carrying out that custom."
> *Id.* at 331. (Emphasis added).

Thus, under *Rice,* the Government must (1) present proof that it is the invariable custom of the office to mail the type of document in question, and (2) present an employee responsible for depositing documents in the mail, who must be able to testify that he actually deposited the document in question, or that it was his invariable custom to deposit documents of that type, which he never failed to do.

Fifty years after *Rice*, the court for the District of Delaware adopted this standard in *United States v. Wolfson*, 322 F. Supp. 798 (D. Del. 1971), *aff'd*, 454 F.2d 60 (3d Cir.), *cert. denied*, 406 U.S. 924 (1972), which remains the law of the Third Circuit today.

In *Wolfson*, the district court dismissed convictions for mail fraud on three counts of an indictment because of the Government's failure to present sufficient evidence of use of the mails. As in *Rice*, the only evidence relating to use of the mails on these counts was the testimony of company officers that the documents in question would have been mailed in the ordinary course of business. No mail clerk or other person directly involved in mailing such documents was called to testify. The district court, relying on *Rice, supra*, reversed the convictions, stating as follows:

> "For a large business enterprise . . . where an officer of the company who had a letter placed in an out-going mail basket would not have personal knowledge that the mail clerk actually deposited the letters in the post office, the strict standard of the *Rice* case should apply." *Id.* at 814.

This standard, enunciated in *Rice* and adopted in *Wolfson*, was applied and analyzed in *United States v. Sinclair*, 433 F. Supp. 1180 (D. Del.), *aff'd*, 566 F.2d 1171 (3d Cir. 1977), where the district court reversed a conviction on count two of a mail fraud indictment, but affirmed the conviction on count three. As to count two, the only evidence of mailing, once again, was the testimony of a business man that he had dictated a letter to his secretary at the request of a defendant, and that it was the practice of the secretary to mail all such letters. The secretary did not testify and the court reversed the conviction stating:

> "If the record in the case at bar demonstrated that Mallan's business was not a large operation and that

> his secretary was a person who actually mailed the letter, that evidence might provide an adequate basis for abandoning the strict adherence to the *Wolfson* holding. The Government, however, did not produce such evidence. Since the secretary responsible for placing GX-37 into the mails did not testify, there is insufficient proof of mailing." *Id.* at 1197.

On the other hand, in count three of the *Sinclair* indictment, where the secretary did testify that it was her invariable custom to place the letter in the mail basket or take it to the mailing room, the evidence was held sufficient to give rise to an inference of mailing, notwithstanding the failure of the Government to produce the mail clerk who picked up the mail from the mailroom and deposited it in the post office:

> "The proof of mailing (in count three) consisted of much more than a description by an executive of what he understood the office practice to be. The testimony was elicited from two persons with direct knowledge of the mailing procedure and each testified to the unvarying practice of the office." *Id.* at 1198.

This distinction reflects the rationale behind the standard applied, to wit, that business custom testimony by persons far removed from the actual mailing process is of such tenuous probative value, that something more is required to justify an inference of mailing. That "something more" is the testimony of an employee who is in some way directly involved in the mailing procedure, and whose testimony on such custom bears stronger indicia of reliability by virtue of that close involvement.

Decisions in the Fourth and Eighth Circuits fall in line with this rationale. In *United States v. Ellicott,* 336 F.2d 868 (4th Cir. 1964), the Fourth Circuit, in revers-

ing a mail fraud conviction, voiced the same concerns over the tenuous nature of "business custom" evidence as those which underlie the standard described above:

> "Principally, reliance is put on a customary practice (to prove mailing) in the Charter Department, for no one states that Jones mailed the letter. Thus, the Government depends merely upon an inference from conventional procedure: that if the department usually noted deliveries in a distinctive way, then it did so in this case. But this is only a probability which, however great, cannot convict. Custom is at best a weak reed . . . while we are sensitive to the difficulties of reconstructing one of a myriad of postal events, nevertheless when, as here, the prosecution makes it the vital nexus of the accused to the crime, it assumes and must surmount this difficulty." *Id.* at 871 *See, also, United States v. Minkin*, 504 F.2d 350 (8th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975).

Thus, the Third, Fourth and Eight Circuits have held that the testimony of an executive about his office's mailing customs, standing alone, is insufficient to raise an inference of mailing, and must be supported by testimony of someone directly involved in the mailing procedure. The Fifth, Seventh and Ninth Circuits, however, have held the exact opposite.

Both *Wolfson* and *Sinclair* have noted the existence of this conflict among the Circuits. The *Wolfson* court points out that the sufficiency issue on the use of the mails has been contested among the courts as far back as the *Rice* decision. *See, United States v. Wolfson, supra*, 332 F. Supp. 798 at 814, and cases cited therein. The *Sinclair* court makes similar reference to the dispute, citing *United States v. Joyce*, 499 F.2d 9 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974) as the prime example of a very lenient viewpoint which *Sinclair* and *Wolfson* specifically rejected:

> "One Circuit has held as sufficient proof of mailing the testimony of an executive describing the office practice, without any testimony by any person actually involved in placing the letter in the mails. *See, United States v. Joyce, supra,* 499 F.2d at 15-16. The *Joyce* standard was rejected by the court in *Wolfson* and this court agrees that a stricter standard is necessary." *United States v. Sinclair,* 433 F. Supp. 1180, 1198 (D. Del.), *aff'd,* 556 F.2d 1171 (3d Cir. 1977).

In *United States v. Joyce,* 499 F.2d 9 (7th Cir.), *cert. denied,* 419 U.S. 1031 (1974), the Seventh Circuit affirmed a mail fraud conviction on facts and issues virtually identical to those which caused the *Sinclair* court to reverse. The defendant in *Joyce* was charged with mail fraud and there was no direct evidence that the letter in question had been mailed. The only circumstancial evidence of mailing consisted of the testimony of a businessman who dictated the letter, that it was his secretary's practice to mail all dictated letters other than interoffice correspondence. *Id.* at 11. The secretary, just as in *Sinclair,* did not testify.

The Seventh Circuit held this evidence sufficient to raise an inference that the mails were used, stating simply that:

> "Testimony as to office practice is sufficient proof of mailing. . . . [W]e hold that Clark's (the witness) testimony was sufficient proof of mailing. Even weaker proof of mailing was held sufficient on some counts in *King v. United States,* 25 F.2d 242, 244 (6th Cir. 1928)." (citations omitted) *Id.* at 11-12.

Thus, according to *Joyce,* the testimony of an executive about his office's mailing practices *is sufficient,* standing alone, to raise an inference of mailing. Petitioner submits that this decision is contrary to that reached in *Sinclair* and its companions, *supra.* The

Fifth and Ninth Circuits have favored the standard set out in *Joyce*. *See*, e.g., *Stevens v. United States*, 306 F.2d 834 (5th Cir. 1962); *United States v. Brackenridge*, 590 F.2d 810, 811 (9th Cir.), *cert. denied*, 440 U.S. 985 (1979).

Petitioner respectfully contends that these cases demonstrate a long-standing conflict among federal courts concerning an important question of federal law which this Court should deign to hear and resolve in favor of the stricter standard of sufficiency promulgated in *Wolfson* and *Sinclair, supra*. These cases speak for themselves, reflecting a deep and justified concern over the inherently tenuous nature of business custom evidence in proving use of the mails, particularly where, as in the present case, it is the sole evidence of mailing, and is given by witnesses not directly involved with the procedure they testify about. The safeguards set up by these courts to prevent convictions based on flimsy, hearsay-type evidence, are reasonable and practicable. Those Circuits advocating the rather cavalier attitude demonstrated in *Joyce*, have never addressed the dangers of such evidence when it is the only support of a critical element in a criminal charge.

In the present case, the only evidence of mailing was the testimony of Horowitz, a high-ranking employee of an adjustment company, about what he understood the office mailing procedure to be, during a time period which bore no connection whatsoever to the period during which the letter was alleged to have been mailed.

There was no evidence that Horowitz had any direct knowledge of office mailing customs, or that such practices were "invariable," or that the procedures had not changed during the six month period between August of 1977, which Horowitz testified to, and January 1978, when the letter was created and allegedly mailed. There was no testimony that Horowitz had reason to know that the letter was mailed, or even that it appeared to have

been mailed. There was no envelope, no indication of how the Curley Adjustment Company came to receive the letter, and no testimony by any secretary, mail clerk or other employee with any sort of direct involvement in the office mailing procedures to support Horowitz' vauge and irrelevant testimony.

Petitioner respectfully submits that there is no question that such evidence, or lack thereof, is clearly insufficient under the standard affirmed by the Third Circuit in *Wolfson* and *Sinclair, supra*. It is further submitted that the evidence is insufficient even under the broad and permissive standard of *Joyce, supra*. *Joyce* holds that testimony by an executive about office mailing customs is sufficient, on its own, to raise an inference of mailing. But Petitioner submits that such testimony must, at a minimum, relate to the relevant time period. Horowitz' testimony was limited to August of 1977 and did not embrace the relevant period of January 1978. In the absence of any evidence to show that the company mailing procedures remained the same during these months, Petitioner contends that there is no basis for an inference of mailing.

In summary, Petitioner respectfully submits that this Court should undertake the task of resolving the questions presented herein, and that even if such resolution favors the permissive standard espoused in *United States v. Joyce, supra,* the circumstances of the present case would call for reversal due to insufficiency of evidence.

II. The Court Of Appeals For The Third Circuit Has Rendered A Decision In Conflict With The Principles Stated In A Prior Decision Of The Same Circuit And Other Circuits.

The Sixth Amendment of the United States Constitution entitles an accused to effective representation by counsel. Petitioner claimed below, and reasserts herein,

that this right was denied him as a result of trial counsel's failure to investigate numerous, critical leads which very likely would have changed the outcome of the trial, and counsel's rejection of an "accomplice instruction" where the Government's primary evidence against Petitioner consisted of testimony from alleged accomplices.

After a post-trial hearing concerning this matter, the district court specifically declined to decide the question of ineffective assistance. (App. B, 1-6). The court of appeals, affirming the conviction, stated that such failures on the part of counsel were permissible trial tactics. (App. D.). Petitioner respectfully submits that in so holding, the court of appeals for the Third Circuit has rendered a decision in conflict with the principles announced in prior decisions of the same Circuit, and as well as those of other Circuits.

During the post-trial hearing in this case, and in his affidavit in support thereof, Petitioner claimed that he told trial counsel that he had been informed that an individual named Edward Lynch, who had competed fiercely but unsuccessfully with Petitioner for potentially lucrative work as a traffic court writ server, planned revenge on Petitioner. (P.T. 6/29/83, 38-40).[2] This was told to Petitioner by Richard Galli, a former Lynch employee, who testified at the post-trial hearing that Lynch was very angry at having lost half his business to Petitioner and had even asked Galli to "do a number" on Petitioner. (P.T. 6/29/83, 59-62).

Petitioner's counsel admitted that Petitioner had told him about Lynch and Lynch's possible motive for the arson, and had given him Galli's name as well. Counsel claimed that he tried to contact Lynch, who refused to speak to him, but made no effort to contact Galli, who was ready and willing to cooperate, because counsel had already decided to abandon the Lynch matter. Counsel

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2. P.T. refers to the post-trial hearings on Petitioners motion for new trial on 6/29/83 and is followed by the relevant page number

reasoned that raising the "Lynch defense" at trial ". . . may open up the door that would create more problems than it would solve." (P.T. 6/29/83, 98). Counsel claimed that he discussed this decision with Petitioner, but Petitioner denied that counsel had done so.

During the trial of this case, the Government made continuous, and ultimately successful, efforts to convince the jury that Petitioner was the only person with a reason to burn down the Jerry Lewis Theatre. Because of trial counsel's failure to pursue the Lynch matter, Petitioner was deprived of what would have developed into a viable defense capable of rebutting the Government's argument and providing the jury with a credible alternative to the Government's theory, to wit, that *Lynch* had both the motive and desire to commit the arson. Petitioner was therefore prejudiced as a result of trial counsel's failure to develop a critical source of exculpatory evidence.

It is now axiomatic that trial counsel has a duty to investigate all sources of evidence which may be helpful in the preparation of his defense, and that the failure to do so will constitute ineffective assistance of counsel if it results in prejudice to the defendant. *See, Baty v. Balkcom*, 661 F.2d 391 (5th Cir.), *cert. denied*, 456 U.S. 1011 (1981); *Bell v. State of Georgia*, 554 F.2d 1360 (5th Cir. 1977); *United States ex rel Cosey v. Wolff*, 562 F. Supp. 140 (N.D. Ill. 1983), *aff'd*, 727 F.2d 656 (7th Cir. 1984); *Ewing v. Williams*, 596 F.2d 391 (9th Cir. 1979).

Furthermore, the Third Circuit has held that counsel's decision not to investigate a source of information cannot be justified by his fear that the results of the investigation may "raise more problems than it would solve" at trial, (P.T. 6/29/83, 98), for such a determination cannot be made until *after* the investigation is completed and the evidence gathered therefrom analyzed and weighed against other factors in the case.

Thus, in *United States v. Baynes*, 687 F.2d 659 (3d Cir. 1982), the Third Circuit reversed a defendant's conviction for conspiracy to distribute cocaine where defendant's counsel failed to listen to and compare a voice exemplar of the defendant with a very short intercepted telephone call allegedly involving the defendant, where the telephone call was the Government's only evidence against the defendant. The attorney admitted that he had failed to listen to and compare the voice exemplar with the intercepted telephone call, explaining that he was afraid that if the comparison proved to be a close one, such evidence would not be helpful at trial. *Id.* at 663.

The Government argued that such failure was a reasonable trial tactic, but the court did not agree:

> "(Defendant's) attorney might well have decided as a matter of trial strategy not to refer to the voice exemplar at trial . . . such a decision on the part of trial counsel could have been made, however, only *after* a careful and comprehensive comparison of the two recordings had been conducted." *Id.* at 666-667 (Emphasis original).

As in *Baynes*, trial counsel in the case at bar completely failed "to investigate a critical source of potentially exculpatory evidence," *id.* at 666, which might have exonerated Petitioner. The decision not even to investigate that source cannot be called a strategic decision justified by the fear that the results of the investigation, if used at trial, might trigger further problems for Petitioner. "Such a decision . . . could have been made . . . only *after* a careful and comprehensive" analysis of the evidence developed. *United States v. Baynes*, at 667.

Petitioner submits that the failure of the court of appeals to examine this case in the context of *Baynes*, particularly where the facts are so closely analogous, resulted in a decision which directly contravenes the

court's earlier principles and analysis and requires examination by this Honorable Court.

It should be mentioned at this point, that counsel's failure to investigate in the present case was not limited to the "Lynch matter," but included numerous other instances of prejudicial neglect, including:

> 1. The failure of counsel to attempt to interview Bertram Horowitz, whose testimony was the Government's only evidence of the critical element of "mailing," after Horowitz attempted to call trial counsel several times.
>
> 2. The failure of trial counsel to interview five persons who claimed to have seen the arsonists, but who, according to agent summaries, could not identify them from a photo spread containing their photographs, and whose descriptions were highly inaccurate. Furthermore, two of these individuals, William Merrell, III and Richard Weller, stated in their interviews with government agents that there was only one person in the arsonists' get-away car. (T. 1/10/83, 123-125). It was possible that an interview of these persons by defense counsel would have revealed that, in fact, they were *certain* that none of the persons in the photo spread were the arsonists and that only one arsonist was at the scene of the crime, in which case the testimony of Fardella, Allen and DiTizio would have been called into serious question.

Petitioner's final contention with respect to serious ineffective assistance, concerns trial counsel's specific rejection of an "accomplice instruction." The law is that when an alleged accomplice implicates a defendant, an accomplice charge must be given, warning the jury of the unreliable tendencies of such evidence. The failure to give the instruction has been held to be plain error where the accomplice's testimony is crucial to the Government's case and his credibility is called into question.

Tillery v. United States, 411 F.2d 644, 648 (5th Cir. 1969); *United States v. Owens*, 460 F.2d 268, 269 (10th Cir. 1972); *United States v. Windom*, 510 F.2d 989, 994 (5th Cir. 1975).

In the present case, the Government's only direct evidence of Petitioner's involvement in the arson was the testimony of alleged accomplice Joseph DiTizio, whose testimony was uncorroborated and highly unreliable in light of his own inconsistent statements and the contradictory testimony of his cohorts, Charles Allen and Louis Fardella.

Under these circumstances, the failure of the court to give an accomplice instruction would have been plain error if not for the fact that trial counsel, according to his own testimony at the post-trial hearing, specifically rejected the instruction. (P.T. 6/29/83, 87-88).

The court of appeals accepted this negligence somehow as a "permissible tactical choice" (App. D) even though the district court, while declining to decide the issue, observed that "I cannot today on July 25th fashion for myself a persuasive reason why an accomplice charge wouldn't have been helpful to (Petitioner) Mr. Alberici." (App. B, 5). Petitioner submits that this observation amounted to a finding by the district court that trial counsel had no persuasive reason for not requesting the charge.

Petitioner maintains that this Court should hear the matter because trial counsel was seriously ineffective in refusing this instruction, resulting in a substantial injustice to Petitioner.

III. The Court of Appeals For The Third Circuit Has Rendered A Decision In Conflict With A Decision Of This Court And In Conflict With The Decisions Of Other Federal Courts.

The Fifth Amendment to the United States Constitutions provides that "no person shall be held to answer

for a capital or otherwise infamous crime, unless upon a presentment or indictment of a Grand Jury. . . ." Thus, this Court has held that even if an indictment sufficiently appraises a defendant of the charges against him and protects him against Double Jeopardy:

> ". . . a conviction of a defendant cannot be upheld on the basis of facts not found by and perhaps not even presented to the grand jury which indicted him." *Russell v. United States*, 369 U.S. 749 (1962).

In *Ex parte Bain*, 121 U.S. 1 (1887) a trial judge struck certain words from an indictment as surplusage and this Court reversed the subsequent conviction, holding that the striking of charging language in an indictment violates the Fifth Amendment because of the possibility that the grand jury might not have indicted had it not made findings connected with the striken language. In other words, the direct amendment of the charging terms of an indictment is a violation of an accused's Fifth Amendment right to be charged *only* by a Grand Jury.

In *Stirone v. United States*, 361 U.S. 212 (1960), this Court went a step further, holding that the constructive amendment of the charging language in an indictment is equally violative of the Fifth Amendment. In that case, the indictment charged Stirone with unlawful interference with interstate commerce in *sand* shipped to Pennsylvania to build a steel plant, but the trial court permitted the Government to introduce evidence of interference with the export of *steel* from the plant to other states, and instructed the jury that it could convict Stirone if it found interference with *either* sand or steel. *Id* at 214-215. This Court reversed, stating that "The *Bain* case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment

against him." *Id.* at 217. Expanding on this point, the Court continued, stating:

> "Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. . . . While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a Grand Jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. . . . The very purpose of the requirement that a man be indicted by a Grand Jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Id.* at 217-218.

The type of constructive amendment condemned in *Stirone* can occur through proof offered at trial, or the trial court's instructions to the jury, or both. *See*, e.g., *United States v. Figueroa*, 666 F.2d 1375 (11th Cir. 1982); *United States v. Cusmano*, 659 F.2d 714 (6th Cir. 1981); *United States v. Stewart Clinical Laboratory, Inc.*, 652 F.2d 804 (9th Cir. 1981). In each instance, such an error constitutes prejudice *per se*, requiring reversal without the need to show prejudice. *Ex parte Bain*, 121 U.S. 1 (1887); *Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Stewart Clinical Laboratory, Inc., supra*, at 807.

The test for distinguishing a constructive amendment, which is prejudicial *per se*, from a mere variance, which requires proof of prejudice, was articulated by the District of Columbia Circuit in *Gaither v. United States*, 413 F.2d 1061 (D.C. Cir. 1969), as follows:

> "An amendment of an indictment occurs when the charging terms of the indictment are altered, either

> literally or in effect, by prosecutor or court after the grand jury has last passed upon them. A variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." *Id.* at 1071.

In the present case, Petitioner was charged with mail fraud under 18 U.S.C. §1341, which defines three ways in which the mails can be used to execute a scheme to defraud:

> 1. "Placing" or depositing mail in a post office or authorized depository for mail,
> 2. "Taking" or receiving from the mails any such matter, and
> 3. "Causing to be delivered" by mail any matter or thing for the illegal purpose described.

Each of these actions constitutes a separate offense under the statute and is not interchangeable. *See, United States v. Richman,* 369 F.2d 465, 466-467 (7th Cir. 1966); *United States v. Klingbeil,* 410 F. Supp. 1235 (W.D. Wis. 1976).

Petitioner was indicted in six counts with "knowingly and willfully causing to be *delivered* by mail" the document in question for the purpose of carrying out a scheme to defraud. However, both the Government's evidence at trial and the district court's instructions to the jury on the elements of mail fraud focused exclusively upon "deposit" instead of "delivery." (App. B). Petitioner was not charged with unlawful deposit and argued that the district court's instructions and the Government's proof amounted to a constructive amendment of the charging terms of the indictment, requiring reversal under the *per se* rule of *Stirone, supra.*

The district court recognized its error in a Bench Opinion (App. B) and ordered a new trial on all six counts of the indictment, but subsequently reinstated

the conviction on count five, holding that since trial counsel did not object to the variance complained of, it was the "harmless error" rule, not the "*per se*" rule of *Stirone,* which applied. The court of appeals affirmed, reasoning that "the grand jury could not have concluded that (Petitioner) caused the delivery without also concluding that he caused deposit." (App. D).

Petitioner submits that the district court erred in applying the harmless error rule applicable to instances of mere variance, when the court itself conceded that a constructive amendment had occurred, and further, that the court of appeals completely missed the point of *Stirone* and is in direct contravention thereof. A serious constitutional question is therefore involved in this case, directly affecting a fundamental and substantial right of Petitioner, and warranting the attention of this Court.

With respect to the district court's decision that the *per se* rule of *Stirone* did not apply to count five of the indictment, Petitioner asserts what the district court had itself acknowledged; that its instructions had seriously altered the charging terms of the indictment. Such an error constitutes a constructive amendment and excludes the application of any harmless error rule because the amendment was *automatically* prejudicial to Petitioner's right to be tried and convicted only upon an indictment whose elements are the same as those passed upon by the Grand Jury. The principles of *Stirone* must therefore apply.

With respect to the decision of the Court of Appeals for the Third Circuit, Petitioner submits that its reasoning squarely contradicts the District of Columbia Circuit in *Gaither v. United States,* 413 F.2d 1061 (D.C. Cir. 1969), wherein the court stated that neither the court, nor the Government, can constructively alter the charge of an indictment merely because the Grand Jury considered facts which could have justified a different or additional charge:

> "Proof at trial of facts different from those charged cannot generally be jusitifed on the ground that the same facts were before the grand jury and that the grand jury might have or even should have charged them." *Id.* at 1066.

It was not for the court of appeals to speculate as to what the grand jury "must have found." Whatever its thinking process might have been, the fact is that the grand jury charged Petitioner only with unlawful delivery, and neither the court nor the Government had the right to base Petitioner's trial on any offense other than this. For the foregoing reasons, Petitioner respectfully submits that the matter presented herein deserves the Court's attention and that the conviction must be reversed.

IV. The Court Of Appeals For The Third Circuit Has Rendered A Decision In Conflict With An Earlier Decision In The Same Circuit, And Raises An Important Constitutional Question Which Should Be Resolved By This Court.

As mentioned in the Statement of the Case, *supra*, the Government argued to the jury that if the jury did not believe that DiTizio, Fardella and Allen had committed the Jerry Lewis arson, which they pleaded guilty to, then the jury should acquit Petitioner:

> "*Mr. Wehner (Prosecutor)*: We brought before you the people that burned it down, and if you don't believe, based upon their testimony, based upon what Merrill told you, based upon the photographs, based upon the expert testimony that those three people burned down that theatre on August 6, 1977, then I invite you to acquit this defendant, because if they didn't burn it down, then there is no fraud.
>
> But I submit to you that you cannot take the evidence —

Mr. Tinari (Defense counsel): Objected to, Your Honor.

Mr. Wehner: — take the evidence and come to any conclusion other than —

Mr. Tinari: Objection.

The Court: Side-bar, Mr. Tinari. (T. 1/18/83, 68).

Petitioner objected, contending that this statement by the Government amounted to an argument that if the jury *did* believe in the guilt of these three witnesses, then Petitioner must also be guilty. (T. 1/18/83, 68-70). Petitioner maintains that the Government's use of its witnesses' guilty pleas as evidence of Petitioner's guilt was a violation of Petitioner's Due Process right to a fair trial, and that the district court's failure to give a cautionary instruction to the jury regarding such argument was plain error.

The court of appeals affirmed the conviction, stating that, the Government's argument was proper because the witnesses' guilty pleas were relevant to credibility, and Petitioner did not object to the "testimony" of these witnesses concerning their pleas.[3] (App. D).

Petitioner submits that the decision of the Court of Appeals for the Third Circuit conflicts with the principles embraced by the same Circuit in *United States v. Newman*, 490 F.2d 139 (3d Cir. 1974), and resulted in a violation of Petitioner's Fifth Amendment right to a fair trial.

In *United States v. Newman*, 490 F.2d 139 (3d Cir. 1974), the Third Circuit held that "guilty pleas of co-defendants are not admissible to demonstrate the guilt of defendants yet to be convicted." *Id.* at 143. The basis of

---

3. It must be noted that it was not the "testimony" of the Government's witnesses concerning their guilty pleas which Petitioner contended was improper, but rather, the Government's *use* of that testimony in its closing argument, which Petitioner did object to. (T. 1/18/83, 68-70).

this rule is the Due Process Clause of the Fifth Amendment, which entitles a defendant "to have his guilt or innocence determined by the evidence presented against him, not by what happened with regard to a criminal prosecution against someone else." *Id.* at 143. To permit otherwise is to sanction guilt by association, which is a fundamental violation of a defendant's right to a fair trial.

In the present case, the purpose and effect of the Government's closing argument was not merely to suggest that its witnesses were credible, but to argue to the jury that since the witnesses were guilty of the arson they pled guilty to, then Petitioner must also have been involved in the arson and is likewise guilty. This was a clear instance of the type of implication condemned in *Newman*, and the Third Circuit's affirmance of Petitioner's conviction on these grounds sanctioned precisely what was earlier proscribed by the same Circuit.

Petitioner also argued that the failure of the district court to give a cautionary instruction to the jury once Petitioner objected to the Government's argument constituted plain error. In *United States v. Harrell*, 436 F.2d 606, 617 (5th Cir. 1970), *on remand*, 458 F.2d 655 (5th Cir.), *cert. denied*, 409 U.S. 846 (1972), the Fifth Circuit found the failure of a trial court to give such an instruction plain error even in the absence of an objection.

Other courts, however, have required not only an objection, but a request for the instruction. *See, United States v. King*, 505 F.2d 602, 607 (5th Cir. 1974), while another court has required an objection but is not clear on what else is necessary. *United States v. Fleetwood*, 528 F.2d 528, 535 (5th Cir. 1976). Petitioner submits that the plain error question in circumstances such as those before this Court has not been resolved and should be settled by this Court. It is Petitioner's contention that the raising of an objection alone, as in this case, is sufficient to trigger the court's affirmative duty to give a cau-

tionary instruction, because the objection, once given, alerted the court to the possible error and created an opportunity for correction.

Petitioner submits that, given the fundamental nature of the constitutional rights involved, and the conflict resulting from the decision of the Third Circuit herein, this Honorable Court should undertake to review the case at bar.

V. The Alleged Mailing Underlying Petitioner's Conviction Was Unrelated To The Scheme To Defraud And Contravenes The Requirement Established By A Decision Of This Court.

Petitioner respectfully contends that the conviction on count five of the indictment cannot stand because the letter and its alleged mailing underlying that count (see Exhibit 12) were not related to the purported scheme charged in the indictment. In support of this contention, Petitioner asserts the following:

1. Horowitz' letter (Exhibit 12) is an itemized breakdown of estimated fire losses *made in response to a request* by Steven Perrone of the Curley Adjustment Company. Its purpose was only to clear up a $54,461 discrepancy between the estimate reached by Horowitz' contractor and the estimate reached by Curley's contractor. It was determined that the difference occurred because Curley's contractor forgot to include the contents in its estimate.

2. At the time that Perrone and Curley Adjustment Company requested and received Horowitz' letter, they no longer represented the insurance company on whose behalf they were supposed to be working. (Safeguard Insurance Company).

3. The letters underlying counts one and three of the indictment related to the same alleged Safeguard claim as the letter underlying count five. It would be impossible for Petitioner to collect three times on a single

claim. Furthermore, any right to collection that Petitioner might have had on such claim, had been lost as a result of Petitioner's failure to submit any notice or proof of loss within the 60 day deadline required by the Safeguard policy.

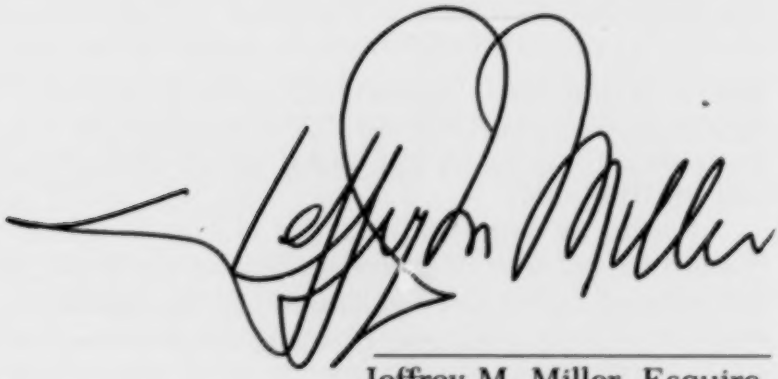
Thus, the Horowitz letter underlying count five of the indictment, related only to an internal misunderstanding between two adjustment companies (one of which did not even represent its purported client, Safeguard, any longer) over a miscalculation having nothing whatever to do with Petitioner or his activities, and made at a time when Petitioner had long lost any right to collect on the policy.

Petitioner submits that the Horowitz letter, under the circumstances of this case, was so far removed from the alleged "scheme to defraud" that to uphold the conviction would contravene this Court's decision in *United States v. Maze*, 414 U.S. 395 (1974), in which this Court held that the alleged mailings must play at "significant part" in enabling the defendant to carry out the aim of the scheme, in order to uphold a conviction for mail fraud. *Id.* at 401. To permit Petitioner's conviction to stand on the alleged mailing of a letter so far removed from the scheme charged, would be to ignore this Court's observation that "Congress *could have* drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. *But it did not do this;* instead, it required that the use of the mails be for the purpose of executing such scheme or artifice . . ." *Id.* at 405. (Emphasis added, footnote omitted).

CONCLUSION

For the reasons advanced in this petition, it is respectfully submitted that a writ of certiorari should be issued to review the decision of the court of appeals below.

Respectfully submitted,



Jeffrey M. Miller, Esquire
NASUTI & MILLER
1325 Spruce Street
Philadelphia, PA 19107
Council for Petitioner

Dated: August 10, 1984

APPENDIX

BEST AVAILABLE COPY

United States of America vs.

United States District Court fo

DEFENDANT: Joseph Alberici

Eastern D. rict of Pennsylvania

DOCKET NO. 82-00267 BJ

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (8/74)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date S. Wehner

MONTH DAY YEAR: November 9, 1983

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[x] WITH COUNSEL Richard A. Sprague, Esq. (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [x] GUILTY.

Defendant has been convicted as charged of the offense(s) of Mail Fraud 18 U.S.C §1341

APPENDIX A A-1

SENTENCE OR PROBATION ORDER

Count five:

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 20 months

under 18 U.S.C 4205(b)(2)

FILED

NOV - 9 1983

MICHAEL E. KUNZ, Clerk

By _____ Dep. Clerk

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

Allenwood

The defendant shall report to said Institution one month from today or remain on bail pending an Appeal

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

Date 11/9/83

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
JOSEPH ALBERICI	:	NO. 82-00267

Philadelphia, Pennsylvania
Monday, July 25, 1983

Before: HONORABLE LOUIS H. POLLAK, J.,

BENCH OPINION

Appearances:
STEPHEN V. WEHNER, ESQ.,
Assistant U.S. Attorney
for the Government

WILLIAM R. HERMAN, ESQ.,
MARK A. STERNLICHT, ESQ.,
for the Defendant

THE COURT: The purpose today is to rule on the motion for a new trial concerning argument which was heard on the 29th of June. The defendant, Joseph Alberici, presented a substantial list of grounds for a new trial. Several of them I think were not of great substance, but there were a couple which were discussed at considerable length at the argument raised what I took to be

serious problems and the matter has been under advisement since then.

A strong general challenge was raised on Mr. Alberici's behalf to the quality of his representation at trial. The challenge was one which asserted that Mr. Alberici had not had effective assistance of counsel, albeit retained counsel, and counsel of considerable experience.

Without detailing the range of challenges made to the representation afforded Mr. Alberici, it is, I think, appropriate to refer to a particular issue which was closely addressed on argument. That issue was the assertion by Mr. Alberici that the failure to give an accomplice charge was plain error. The argument [illegible]sed that there had been consideration given by counsel and the court to an accomplice charge, which would have seemed a natural ingredient of instructions in a case structured as the case against Mr. Alberici was, since the prosecution depended very heavily on the testimony of persons allegedly linked with Mr. Alberici in the alleged arson, if it was indeed an arson, which was the focus of the alleged mail fraud.

On argument it developed not only that such an instruction had been discussed but that defense counsel having considered the matter at length among themselves, and in discussion with Mr. Alberici before points for charge were discussed with the court, had concluded that an accomplice charge was not in Mr. Alberici's interest and accordingly counsel decided against including such a charge.

With matters in this posture I inquired of Mr. Herman, who, with Mr. Sprague, was arguing the motion for new trial on Mr. Alberici's behalf, whether the fact that trial counsel had expressly disavowed any interest in an accomplice charge to the point of not wanting one didn't remove the issue, even potentially, from the plain error category. Mr. Herman's view on argument was that this was the case, although it remained, so Mr. Her-

man argued an ingredient of ineffective assistance of counsel contention.

By subsequent written submission to the court Mr. Herman has offered a different view, urging that his concession on the plain error question was, as he put it, "improvident." That's a very elegant adjective and I will accept it. That is to say, I will accept Mr. Herman's change in views, certainly one he is entitled to make.

I have some difficulty in supposing that a failure to give a particular instruction to a jury could be plain error, detrimental to a defendant to the point where reversal would be compelled in a situation in which trial counsel had expressly contended against the instruction, whose omission is argued to be plain error. That is to say, I cannot reason my way to accepting that in the plain error category unless, I'm prepared to go on and say the insistence of counsel for the defendant that a particular instruction not be given is ineffective assistance of counsel. Otherwise, the contention would seem to be that a defense attorney doing his or her job could be told by a court on this particular issue, which seems to me to be fundamental to the doing of justice in this courtroom, "Your position is one which is counter to your client's best interest and I won't accept your judgment on the matter because I'm convinced that to defer to your view of what's in your client's best interest would be incompatible with the doing of justice." I leave the matter at that because I don't find it necessary for the purpose of my ruling on this motion to determine whether there was a failure or failures on the part of trial counsel which deprived Mr. Alberici of effective assistance of counsel. It's simply not an issue which I find necessary to reach one way or the other.

Also, with respect to the particular question whether an accomplice instruction should have been included, I could not on June 29th when this motion was argued, and the motion included the taking of testimony from trial counsel, I cannot today on July 25th fashion

for myself a persuasive reason why an accomplice charge wouldn't have been helpful to Mr. Alberici to the extent that it would have any predictable impact at all. Trial counsel took a different view and the charge was structured in deference to that perception. Having made that observation I'm not now prepared to go on to say that the perception of trial counsel, discrepant from my own as to the utility of such an instruction was irrational and prejudicial to Mr. Alberici to a degree that would add up to ineffective assistance of counsel. In mentioning that particular ingredient of the question of the quality of Mr. Alberici's representation at trial, I don't mean to leave the impression that there were not other aspects of the trial representation which were challenged by Mr. Alberici's present counsel on his behalf. There were, but I see no present reason to explore them.

Before I leave the issue of the quality of Mr. Alberici's trial representation, let me also say that I do not mean by having canvassed one aspect of that representation and having explained my substantial uncertainty as to why trial counsel made the judgment which was made, I do not mean with respect to that issue, or any of the uncanvassed by me challenges raised to the representation at trial, to leave the impression that I have made a determination sub silentio that Mr. Alberici did not have effective assistance of counsel at trial. I have made no such determination. I have made no such determination either explicitly or implicitly. I want that clearly understood.

Now, why is it unnecessary for me to resolve the issue of quality of Mr. Alberici's representation at trial? The reason is that after giving the matter very considerable thought I have concluded that an error in my charge was plain error and requires that the burden of guilty be set aside and that a new trial be granted. Wherein lies the error?

An important dimension of the motion for new trial was the claim that the record does not support a verdict

for guilty on counts which are in this respect identical, which allege violations of 18 USC, 1341, in the following terms: that the defendant "knowingly and willfully caused to be delivered by mail, according to the directions thereon." Thereafter, a reference to a specified document. All 6 of the mail fraud counts against Mr. Alberici were cast in those terms.

Those familiar with 18 USC, Section 1341, will recognize that language from the indictment as tracking the last of the 3 ways of characterizing mail fraud embodied in Section 1341. Section 1341 describes the offense in the following terms, having characterized the fraud that the use of the mails is intended to accomplish, the statute goes on to specify, "places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . ." Second, the statute proscribes, "or takes or receives therefrom, any such matter or thing . . ." And finally, "or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing . . ."

The defendant took the position on motion for new trial that the evidence did not support an inference of delivery. The government strongly resisted that contention and there was much argumentation as to what inferences could be drawn from various pieces of mailed matter, some of which have markings on them, and as to all of which there was testimony about the way in which they came into the mails.

What I found of concern on the argument, and have continued to find of concern, was that the charge which I gave to the jury did not focus on the language of delivery, that is, the third of the three phrasings, but, rather, on the language of deposit. To quote from my charge at page 17:

> "Second, The Government must prove that Mr. Alberici placed, or caused to be placed, in a post of-

fice or other authorized depository for mail a letter intended to be sent or delivered by the postal service."

That, I think, is quite obviously a close paraphrase of the statutory language, "places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service."

On the argument of the motion it was strongly urged by the government that I was laboring an incidental issue that was really not germane. The essence of the government's position was that the most one could say was that there was an inconsequential variane between the language of the charge and the language of the indictment, the language of each being well anchored in the statute. In support of that position the government placed strong reliance on the decision of my colleague, Judge Ditter, in United States versus Kelly, 507 F.Supp. 495, 1981, and the government also placed strong reliance on an Eighth Circuit opinion in United States versus Anderson, 618 F.2nd 487, decided in 1980, a decision on which Judget Ditter placed great reliance.

These cases, the government argued to me, support the conclusion that the third of the formulations in Section 1341, "or knowingly causes to be delivered by mail according to the direction thereon," and so forth.

The language that here appeared in the indictment is not to be viewed as alternative to — that is to say, disjunctive from the first two formulations in Section 1341, but that it essentially recapitulates those. So perceived, the indictment language, "knowingly causes to be delivered by mail," is in effect to be taken as synonomous with the language of "places in any post office or authorized depository for mail matter," which was the language which I had essentially tracked in my charge.

From this perspective, so the argument ran for the government, there really wasn't even a variance. The

two statutory formulations mean the same thing. So, to have used one in the indictment, that is, the third formulation, and the other first formulation in my charge, was not to have done any disservice to Mr. Alberici.

Now, let's take the cases on which the government relies. Judge Ditter in the Kelly case talked about Anderson. This is the way he describes it:

> "Counts 3 to 10 of a mail fraud indictment charged defendant with 'placing in an authorized depository for mail matter' eight change of address forms while counts 11 to 21 charged him with causing the forms to be delivered. At trial, the Government proved that Anderson had forwarded to the IRS 28 change-of-address forms with fictitious male names for purposes of obtaining refunds on the same number of fraudulent 1040 forms which he had previously filed. The defendant contended that while the evidence may have been sufficient to prove that Anderson knowingly caused the change of address forms to be delivered as charged in Counts 11 through 21, there was no evidence that he personally mailed them as charged in Counts 3-10. Therefore, he argued that the evidence was at variance with the allegations in Counts 3-10 of the indictment. In rejecting this argument, the Court held as follows":

And then Judge Ditter quotes from the Eighth Circuit:

> "Here, the evidence introduced at trial showed that Anderson prepared the 5 change-of-address cards and that the cards were processed through the mail. Substantial evidence was presented to the jury from which it could conclude that Anderson, at a minimum, 'knowingly caused to be delivered by the mail' the cards in violation of section 1341. In fact, as stated above, Anderson does not appeal

those counts of the indictment which contained the former language. The variance between the words in the indictment and the proof offered at trial did not prejudice or affect the substantial rights of Anderson."

Now, Anderson then, as described by Judge Ditter and as appears from the language in the opinion which Judge Ditter quotes, was a case in which the defendant was complaining about a failure to prove those counts which charged him with "placing in an authorized depository for mail matter" certain items, while he was making no complaint about counts which charged him and under which he was found guilty of delivery in violation of the statute. In that state of the record, and noting as the Court of Appeals did note that there was evidence that showed "that Anderson prepared the change-of-address cards," then we have a situation in which there was a finding of delivery and a finding the defendant had prepared the materials for the mail — I'm sorry, and there was evidence that the defendant had prepared the materials for the mail, the inference that they were deposited in the mail antecedent delivery was overwhelming.

Now, in our case we have in effect the obverse: instructions that talked in terms of depositing mail in a depository, but in which the charge was delivery. Now, there may have been an instruction to the jury that if one finds that materials were deposited in the mail, there is a presumption that they were delivered, but my charge does not contain any instruction to the jury of such a presumption.

Now, let's consider Judge Ditter's Kelly case in which he relied on Anderson. Judge Ditter pointed out that was the case in which the 5 counts of the indictment included two counts, namely counts 3 and 5, which charged the placing of mail matter in an authorized delivery, while three counts, 1, 2 and 4 charged

delivery. Judge Ditter noted on pages 504 to 505 of his opinion:

> "It is asserted that by using the divergent language in the indictment, the Government obligated itself to prove mailing under Counts III and V and actual delivery under Counts I, II, and IV. Defendants then contend that the evidence of mailing and delivery was insufficient to support convictions of the acts alleged. This argument is not persuasive. It is well settled that in order to establish a violation of the mail fraud statute it is not necessary to show that defendants actually mailed anything themselves. It is sufficient to prove that they caused it to be done."

And then Judge Ditter develops what the evidence was in his case. He then by way of footnote, the footnote which discusses the Anderson case, goes on to touch on the issues which the government argued on June 29th. Judge Ditter said:

> "I am unable to agree with defendants' assertion that under Counts I, II, and IV of the indictment, the government obligated itself to prove that the promotional materials were actually delivered to the publishing houses."

Those, of course, were the three delivery counts. Thereafter, Judge Ditter addresses the Anderson case which he characterizes as presenting a similar argument. I, of course, read what he said about Anderson, and a similar argument was made in Anderson, but with the qualification that, as I have noted, Anderson was a case in which the defendant was complaining that the depository counts were not properly supported, while Kelly and the case now at bar is a case in which the claim was made that there was inadequate proof of delivery. After Judge Ditter discusses the Anderson case, he returns to his own case:

> "So, here, the government introduced more than ample evidence from which the jury could have determined that one of the elements of a mail fraud violation had been met, i. e., defendants knowingly caused the mailing of the promotional materials in the execution of their scheme to defraud. It was not necessary for it to prove actual delivery to meet the divergence in the language of the indictment."

And so, it is argued by the government here that the verdict against Mr. Alberici is supported because the proof was plain, very plain, that Mr. Alberici caused the mails to be used and that it is that concept of causing the mails to be used which is at the heart of section 1341, whether the indictment be phrased in terms of deposit or of delivery.

Now, with a view to exploring the record against which Judge Ditter was writing Kelly, I examined the argument by government counsel and Judge Ditter's charge. Government counsel in the Kelly case had this to say:

> "But it's the government's contention here, and I think you have heard various witnesses testify concerning this, that the mailings, that is, the invitations and the letters, the letters and the R.S.V.P. cards, were sent out to invite some 70 or more companies that were in the music business to come to a demonstration of the CAMPS system. This was a snowy night in January and some of the people who said they got the invitations and letters also said they weren't able to come because of the bad weather. They didn't have to come to the party for it to be mail fraud.
>
> The testimony as I recall it, and remember you are the judges of the facts, was that Miss Franchetti sent out — she personally mailed, delivered to the Post Office all of the invitations and the letters and

she sent them out to all the people on that list. We brought in four or five winesses who with the exception of the people from Presser out in Bryn Mawr was able to say that yes, indeed, they had got something in the mail from Broomall. The people in Presser were not sure whether or not they got anything in the mail. The best they were able to say it was in a mail slot or words to that effect, but they couldn't tell whether or not it had come in the mail, but I submit to you that the other witnesses said that they had received items in the mail from Broomall Industries. I don't think we have to prove it twice. We've really actually proved it twice, it seems to me, by showing you the sending and the receipt of the other end."

Now, I have described the Kelly indictment as one which in its different counts use both formulations. Now, Judge Ditter presented the bill of indictment of the jury in this way:

"I told you that there were 5 counts charging mail fraud in this bill of indictment.
Each of this five counts charges that on or about January 5, 1976 the defendants for the purpose of executing and attempting to execute the scheme to defraud, which I have just referred to, knowingly and willfully caused CAMPS brochures and invitations to be delivered, or sent and delivered by mail.

Now, to this point each of the five counts are practically the same. They differ because each refers to a separate and distinct use of the mails, all on the same date, on or about the 5th of January, 1976, but each is different because each refers to a different addressee.

The specific use in these five counts is as follows:

Count 1 refers to a mailing which is alleged to have been made to the Theodore Presser Company.

It charges that the defendants caused CAMPS brochures and invitations to be delivered by mail.

Count 2 refers to the Shawnee Press and charges that the defendants caused CAMPS brochures and invitations to be delivered by mail.

Count 3 refers to the Standard Music Company and charges that the defendants caused CAMPS brochures and invitations to be placed in an authorized depository for mail to be sent and delivered by the U.S. Postal Service.

Count 4 refers to Charter Publications and charge the defendants caused CAMPS brochures to be delivered by mail.

And Count 5 refers to Big Bells and charges the defendants caused CAMPS brochures and invitations to be placed in an authorized depository for mail matter to be sent and delivered by the U.S. Postal Service."

In short, Judge Ditter paraphrased each of the counts, those that dealt with deposit and those that dealt with delivery.

Now, what was done in this case? What was done in this case was that I charged the jury as follows:

"The charge against Mr. Alberici is that of using the mails to carry out an allegedly fraudulent scheme, and it is a federal crime, that is to say, a crime against the United States, because Congress has authority to regulate and protect the mails, and pursuant to that power has passed a law, Section 1341 of Title 18, which makes it a crime deliberately and with specific unlawful intent to use the mails as an essential means of accomplishing some fraudulent scheme.

Now, the three elements which the Government must prove beyond a reasonable doubt are these:

First: The Government must prove that Mr. Alberici devised, or intended to devise, a scheme or artifice to defraud, or to attempt to defraud, certain insurance companies out of money by means of false or fraudulent representations as to the cause of the damage to the Jerry Lewis Movie Theater.

Let me repeat that: That the Government must prove that Mr. Alberici devised, or intended to devise a scheme or artifice to defraud, or to attempt to defraud, certain insurance companies out of money by means of false or fraudulent representations as to the cause of the damage to the Jerry Lewis Theater.

Second: The Government must prove that Mr. Alberici placed, or caused to be placed, in a post office or other authorized depository for mail a letter intended to be sent or delivered by the postal service; and

Third: The Government must prove that Mr. Alberici's act or acts of using or causing the use of the United States Mails was done willfully and with the specific intent to cary out or attempt to carry out some essential step in the execution of the scheme or artifice to defraud.

I will now talk to you about each of these three elements in turn:

The first, as I have said, is that Mr. Alberici devised, or intended to devise, a scheme or artifice to defraud certain insurance companies out of money by means of false or fraudulent representations as to the cause of the damage to the theater.

I will now instruct you as to how the law defines the term 'scheme or artifice to defraud,' and 'false or fraudulent.'

The words 'scheme or artifice to defraud' include any plan or course of action intended to deceive others and to obtain by false pretenses, misrepresentations or false promises, money or property from the person so deceived.

Now, the indictment, which you will have with you, as I say, but as I remind you, is not evidence. The indictment sets forth the scheme with which the defendant is charged in some detail. In order to meet its burden, it is not necessary for the Government to establish beyond a reasonable doubt every detail of the scheme as set forth in the indictment. The Government must, however, establish beyond a reasonable doubt that during the time period alleged, commencing, as you will remember, in approximately May of 1977, the defendant devised and carried out a scheme that was substantially the scheme described in the indictment. The Government need now, however, prove that the fraudulent scheme was successful, that is to say, that the defendant, Mr. Alberici, received the expected benefits of the scheme to defraud.

Now, a statement or representation is false or fraudulent within the meaning of this statute if known to be untrue or made with reckless indifference as to its truth or falsity, and made or caused to be made with the intent to deceive. A false or fraudulent misrepresentation may be made by statements of half truths or the concealment of material facts as well as by affirmative statements or acts.

The second element that the Government must prove, as you remember, is that Mr. Alberici placed or caused to be placed in a post office or otherwise authorized depository for mail a letter intended to be sent or delivered by the postal service.

Now, it is not necessary that the defendant himself personally placed the document or object in the mail, or that he personally directed that it be placed in the mail. It is sufficient that the means of delivery was in fact that mails and that the defendant could reasonably have foreseen the mails would be used."

Now, that was the core of the charge as I gave it. Now, that, I think, connects logically with the government's presentation to the jury and the government's closing, just as in the Kelly case Judge Ditter's charge connected logically with the government's argument there.

In the closing to the jury which was considering Mr. Alberici's case, the government said:

> "I invite your attention to Government Exhibits 8 through 13. These basically, ladies and gentlemen, are the mailings that are charged in the indictment as part of the scheme to defraud. You remember I had Mr. Horowitz go through these in some detail and basically he told you that all of these were mailed. They were mailed in the normal course of his business and they are mailed for the purpose of collecting the insurance proceeds for the defendant."

At an earlier stage the government counsel advised the jury, "It is called a mail fraud scheme because, you recall the testimony which came from the witness stand, the defendant hired an adjustor which used the United States mails to go to the insurance companies and collect the proceeds. That's basically what the indictment charges and what I submit to you the evidence has proven."

Now, the charge which I gave is one which tracks very closely one of the charges submitted by the government to me as a proposed form of charge. That proposed form of charge broke the offense down into three ingredients.

"First: The Government must prove that Mr. Alberici devised, or intended to devise, a scheme or artifice to defraud, or to attempt to defraud, certain insurance companies out of money by means of false or fraudulent representations as to the cause of the damage to the Jerry Lewis Movie Theater."

Second: The Government must prove that Mr. Alberici placed, or caused to be placed, in a post office or other authorized depository for mail a letter intended to be sent or delivered by the postal service."

It then goes on to charge the requisite elements of willfullness. So, there is no mystery in the language which I charged the jury from. It is a perfectly proper charge. Had the indictment been cast in the language of deposit, had I been as alert as I should have been to the form of the actual indictment, I would have drawn from government's request number one which I think stated the matter properly.

> "It is further charged in the indictment that on or about 6 separate dates described in 6 counts of the indictment, that in the Eastern District of Pennsylvania Joseph Alberici, the defendant, for the purpose of executing a scheme or in an effort to execute it willfully caused to be delivered by mail 6 separate items, each described separately in the 6 counts of the indictment, in violation of Title 13 United States Code Section 1341."

But as it came out I followed an alternative government request and what I did not do was what Judge Ditter did do in his properly-decided and properly-tried Kelly case, described to the jury precisely what each count of the indictment was before them specified. The jury which heard my charge was entitled to believe, indeed was obliged to believe, that the indictment as I understood it was one which charged deposit rather than delivery.

I'm not making the determination that there was no evidence in this record from which a jury, properly instructed, could have found delivery. I'm not making the determination that making a determination the other way that this record is sufficient to support delivery. It is not necessary for me to make that determination for the purposes of ruling on the motion today.

There is no question that the evidence was abundant to support a finding of mailing and, as I say, it is not necessary for me to pursue it. It would not be hard to find in the evidence of record material from which the jury could properly have inferred delivery of some of the items which delivery was charged. Certainly if there had been an instruction which advised the jury of presumption of delivery which follows evidence of mailing the jury could have easily done so. The difficulty which I conclude is a fatal difficulty, is that what the jury was charged before them was an allegation of deposit in a mail depository, when the indictment actually read in terms of delivery, and the cases relied on by the government do not persuade me that these are fungable statutory formulations, and the substitution of one for the other is a matter of total interchangeability.

In the Anderson case the Eighth Circuit concluded properly, so far as I can tell, although I do not have the advantage of having read the charge in that case, but where the defendant had no quarrel with the counts which yielded a verdict of guilty on delivery, he could not properly be held to quarrel with the counts which alleged deposit.

In Judge Ditter's case he was at pains to point out that the particular character of each of the counts, some alleging deposit and some alleging delivery that went before the jury and there was evidence as one gathers from the government's closing and from Judge Ditter's charge which would support inferences, both of mailing and of delivery and, as I have noted, Judge Ditter also instructed his jury on the element of presumption.

> "There is a well-settled rule in the law that if a letter is properly directed and if there is proof that it's been put into a Post Office or delivered to the postman, then a jury may infer from the known course of business in the Post Office Department that that particular piece of mail reached its destina-

tion at the regular time and was received by the person to whom it was addressed."

Our case is one in which the charge did not conform with the indictment so the jury, in my view, was not properly instructed on what the ingredients were of the offense, which was its responsibility, to determine had or had not been committed by this defendant. I regret reaching this conclusion because it is clear that the error was mine and with that error now disclosed calls for a retrial of this matter. To that extent my error in penetrating with precision the content of the indictment before me has generated a considerable expenditure of time by others, as well as myself. I say this, of course, without meaning to pass judgment on whether any of the other bases for a new trial are sustained.

It suffices for me today to conclude that the error which I have identified is one which requires a new trial. So an order granting defendant's motion will be entered.

Thank you for your attention.

MR. HERMAN: Your honor, the only question I have is would your Honor consider at some point a motion of less than 46 which addresses the issue of the sufficiency of the evidence, because if the evidence was insufficient as to some of those counts, even with presumption of delivery, Mr. Alberici should not be tried, at least as to those counts. There is a considerable difference between a three-count indictment as opposed to a six-count indictment.

THE COURT: Well, obviously you are certainly entitled to submit such motion, and Mr. Wehner will respond I'm sure.

MR. HERMAN: It will be as short as possible.

THE COURT: All right.

MR. HERMAN: Thank you, Your Honor.

THE COURT: All right, thank you, gentlemen.

(Court adjourned.)

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

UNITED STATES OF AMERICA	:	CRIMINAL
v.	:	
JOSEPH ALBERICI	:	NO. 82-00267

ORDER

Upon consideration of defendant's motion for acquittal, or, in the alternative, for a new trial, and the Government's response thereto, and after a hearing and argument on the motion held on June 29, 1983, for the reasons announced from the bench on July 25, 1983, it is hereby ORDERED that the motion for a new trial is GRANTED.

POLLAK, J.

July 26, 1983

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

UNITED STATES OF AMERICA	:	CRIMINAL
v.	:	
JOSEPH ALBERICI	:	NO. 82-267

MEMORANDUM

September 2, 1983

POLLAK, J.

Joseph Alberici was indicted on six counts of mail fraud, 18 U.S.C. §1341, growing out of a fire — alleged to be an arson — which took place at a theater Mr. Alberici was in the process of acquiring and on which he had taken out insurance. The matter came to trial before a jury and Mr. Alberici was found guilty on all six counts. Thereafter, new counsel entered the case on Mr. Alberici's behalf and filed a motion for the entry of judgment of acquittal on the ground of insufficient evidence, and, in the alternative, a motion for a new trial on numerous other grounds.

On July 25, 1983, in a bench opinion, I determined that a new trial should be had. I concluded that the jury's verdict was flawed for the reason that there was a critical discrepancy between the offense as defined in the indictment and the offense as characterized in the charge to the jury. Each count of the indictment alleged that defendant Alberici "knowingly and willfully caused to be delivered by mail, according to the directions thereon, " a communication implementing the allegedly fraudulent scheme. However, the charge to the jury instructed the jury not in terms of delivery but of the antecedent mailing: "The Government must prove that Mr. Alberici placed, or caused to be placed, in a post office or

other authorized depository for mail a letter intended to be sent or delivered by the Postal Service." To be sure, both formulations — i.e., both the mailing of mailed matter and the delivery of mailed matter — are covered by the language of section 1341.[1] I held, however, that where the grand jury had in each count of its indictment utilized one formulation (in this instance, delivery) and not the other, it was incumbent upon the court to charge the jury accordingly. The variance — relating, as it did, to an ingredient of the offense which is jurisdictional — seemed to me to be fundamental.

The Government has moved that I vacate the Order of July 25. Without conceding the correctness of my conclusion that the indictment and the charge were fundamentally discrepant, the Government argues that, assuming *arguendo* there was error, the error was not challenged at trial and was in any event harmless, an aspect of the matter not fully addressed in my July 25 bench opinion.

Defendant responds that this case is controlled by *Stirone v. United States*, 361 U.S. 212 (1960). The

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1. Section 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false, or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Court there said: "While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Id.* at 217. However, as the Government has pointed out, in *Stirone* the variant proof and the charge which built upon that variance were objected to at trial. *Id.* at 214. In the present case, since the variance was not challenged at trial, the issue posed is the one formulated by the Court in *United States v. Hasting,* 103 S.Ct. 1974, 1981 (1983):

> The question a . . . court must ask is this: Absent [the error], is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?

At trial, the Government offered testimony from which the jury could have inferred — and, in view of the court's charge and the verdicts of guilty returned on all six counts, evidently did infer — that the documents referred to in the six counts were mailed. However, the evidence tending to show delivery of the documents varied substantially from count to count. With respect to count six, the jury might have inferred delivery from the presumption that a document duly mailed reaches its destination — but the jury was not charged with respect to such a presumption. There were markings on the documents dealt with in counts one, three and four, and on the envelope containing the document dealt with in count two, from which inferences of delivery might appropriately have been drawn; but such inferences were not, in my judgment, compelled. With respect to counts one, two, three, four and six, therefore, I cannot conclude that as to any of them it is "clear beyond a resonable doubt" that the jury would have returned a verdict of guilty had the court's charge been cast in

terms of delivery rather than mailing, and so the Governments' motion to vacate the Order of July 25 will be denied with regard to those counts.

Count five stands in a different posture. Government exhibit 12 — the document covered by count five — is a communication addressed to one Steven Perrone of the "Curly [sic] Adjustment Co." in Philadelphia. On that document is the stamped entry:

RECEIVED
JAN 24, 1978
CURLEY ADJUSTMENT BUREAU

I conclude that the jury, without question, would have found defendant guilty under count 5 had it been properly charged that it must be satisfied beyond a reasonable doubt that Government exhibit 12 was delivered. The error that occurred, therefore, was harmless.

Although I have found that the evidence adduced by the Government would have yielded a verdict of guilty only under count 5, it bears repeating that in my judgment the evidence would have been sufficient to support a verdict of guilty under the other counts as well had the jury been properly instructed. Wherefore, defendant's motion for a judgment of acquittal for lack of sufficient evidence will be denied. The other grounds relied upon by defendant in challenging his conviction are without merit, and, therefore, denied.

CONCLUSION

Accordingly, in the accompanying Order, (1) this court's Order of July 25, 1983 granting a new trial is vacated with respect to count five only, and as to that count the jury's verdict of guilty is reinstated; and (2) defendant's motion for a judgment of acquittal and his alternative motion for a new trial are denied.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1841

UNITED STATES OF AMERICA

v.

JOSEPH ALBERICI,

Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Criminal No. 82-00267)
District Judge: Hon. Louis H. Pollak

Argued
May 14, 1984
Before: GIBBONS and HUNTER, *Circuit Judges*
and RAMBO, *District Judge**

(Opinion Filed: May 15, 1984)

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*Hon. Sylvia H. Rambo, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

MEMORANDUM OPINION OF THE COURT

GIBBONS, *Circuit Judge:*

Joseph Alberici appeals from a judgment of sentence imposed following his conviction of mail fraud in violation of 18 U.S.C. §1341. He contends that the trial court erred when, after granting his motion for a new trial, the court reconsidered, and reinstated the verdict.

Relying on *United States v. Hart*, 693 F.2d 286 (3d Cir. 1982), Alberici contends the verdict cannot stand because there is no evidence that the mails were used to transmit Exhibit 12, the document upon which the finding of mail fraud depends. There is testimony, however, by the witness Horowitz of the regular practice of mailing such documents. From this evidence the jury could legitimately *infer* mailing of Exhibit 12.

Alberci also contends that the government's evidence and the court's charge amount to a consecutive amendment of the indictment in violation of the rule of *Stirone v. United States*, 361 U.S. 212 (1960). The indictment charged that Alberici "knowingly and wilfully cause[d] to be delivered by mail, according to the directions thereon" an identified document. App. at 16. The document, Exhibit 12, contains a stamped entry: 'Received, Jan. 24, 1978, Curley Adjudgment Bureau." App. at 276. This evidence permits an inference that the document was caused to be delivered by the post office to Curley Adjustment Bureau. *The court's charge, which was not objected to, instructed that "[t]he government must prove that Mr. Alberici* placed, or caused to be placed, in a post office or other authorized depository for mail a letter intended to be sent or delivered by the postal service . . ." App. at 1558. The charge *refers* to deposit as well as delivery, but the Grand Jury could not have concluded that Alberici caused delivery without also concluding that he caused deposit. ?????

Alberici contends that the court erred in permitting the admissions of guilt by government witnesses to be used to establish his guilt. *There was no objection to the testimony in question.* In any event the witnesses' guilty pleas were relevant on credibility. The government's reference, in argument, to the witnesses' guilty pleas was on this record proper.

Finally, Alberici contends that in two respects he was denied the effective assistance of counsel. *The first is the alleged failure to investigate the so-called Lynch defense. At post-trial hearing counsel testified to efforts to interview Lynch, but gave an explanation for not pursuing the matter, credited by the trial court, which is well within the range of normal competency. The second is counsel's decision not to request an accomplice instruction. This, too, was a permissible tactical choice. See* Fed. R. Crim. P. 30.

The judgment appealed from will be affirmed.

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 83-1841

UNITED STATES OF AMERICA

v.

JOSEPH ALBERICI,

Appellant

(D. C. Criminal No. 83-00167)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*, and RAMBO, *District Judge**

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____
Judge

Dated: June 14, 1984

* Hon. Sylvia H. Rambo, United States District Judge for the Middle District of Pennsylvania, on panel rehearing only.

Q. The fire was unknown to insured; is that correct?

A. That is correct.

* * *

Q. I show you Government Exhibit 12, which is a letter to Mr. Steven Perrone of the Curley Adjustment Company, dated January 2, 1978, under your signature, and ask you, please describe what that is.

A. It's dated January 23, 1977, and that's letter which sends our claim to Mr. Steven Perrone, and he was the adjustor at the time that represented one of the insurance companies.

Q. So he was performing the same role for the insurance companies that you were performing for the defendant; is that correct?

A. That's right.

Q. You said that was dated January 23, 1977.

To your knowledge, is that a misdate on that letter?

A. It would have to be, yes. It's a misdate. It would be January 23, '78.

Even though it appears January 23, 1977?

* * *

A. Yes. There's a stamp received January 24, 1978.

Q. I show you Government Exhibit 13, which appears to be a letter to Mr. Albert Kennedy regarding the loss.

Q. Was that sent out from your office?

A. Yes.

Q. And what does that contain?

A. This contains our claim on the building, and it is sent to Albert Kennedy who represented some of the

other insurance companies, or another insurance company.

Q. Now, the documents that follow that, generally, what are those?

A. The documents that follow that is an estimate on the building damages.

Q. And what do those damages total?

A. $214,249.

Q. Is that the amount of claim by the defendant in this case?

A. Yes.

Q. Sir, in August of 1977, the normal course of the business of your company was to mail these documents; is that correct?

A. Yes, that's correct.

Q. If Mr. Alberici had not hired you, sir, to represent him in this claim, would you have mailed any of those documents?

A. No.

MR. WEHNER: I have nothing further, your Honor.

CROSS—EXAMINATION

BY MR. GORBEY:

Office - Supreme Court, U.S.
FILED
NOV 10 1984
ALEXANDER L. STEVAS.
CLERK

No. 84-236 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH ALBERICI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to establish that petitioner caused the mails to be used in furtherance of his arson and insurance fraud scheme.

2. Whether the mailing of a particular insurance claim form was done in furtherance of a scheme to defraud.

3. Whether petitioner was denied effective assistance of counsel at trial.

4. Whether an alleged error in the district court's instructions on the elements of mail fraud was harmless.

5. Whether petitioner was prejudiced by the prosecutor's alleged reference in summation to the guilty pleas of three government witnesses.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-236

JOSEPH ALBERICI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. A25-A27) is reported at 735 F.2d 1351. The post-trial rulings of the district court (Pet. App. A2-A24) are also unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A25-A27) was entered on May 15, 1984. A petition for rehearing was denied on June 14, 1984 (Pet. App. A28). The petition for a writ of certiorari was filed on August 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on six counts of mail fraud, in violation of 18 U.S.C. 1341. The district court subsequently determined

that one aspect of its instructions to the jury on the elements of mail fraud was erroneous and for that reason granted petitioner's motion for a new trial (Pet. App. A2-A20). Upon reconsideration, the district court reinstated the conviction on one mail fraud count (Count 5) on the ground that, as to that count, the erroneous jury instruction had been harmless beyond a reasonable doubt (Pet. App. A21-A24). Petitioner thereafter was sentenced to a 20-month term of imprisonment (Pet. App. A1). The court of appeals affirmed in a memorandum opinion (Pet. App. A25-A27).

The facts underlying petitioner's conviction may be summarized as follows. On May 9, 1977, petitioner entered into an agreement to purchase the Jerry Lewis Theatre building in Ashton, Pennsylvania. The purchase price was $210,000, and settlement was scheduled for August 6, 1977 (C.A. App. 367-370, 394, 431). The seller had no insurance on the theatre, and petitioner was advised to acquire $110,000 in insurance coverage prior to the settlement in order to protect his interest (*id.* at 432-434). On May 14, 1977 petitioner purchased $100,000 in fire insurance coverage from insurance agent Leonard Triggiani. The policy provided coverage for three months, until August 14, 1977 (*id.* at 535).

In mid-July 1977, petitioner approached Joseph Ditizio about setting fire to the theatre. Ditizio and petitioner drove to the theatre and, after inspection, Ditizio stated that the arson would cost between $20,000 and $25,000 (C.A. App. 600-602). Petitioner told Ditizio that he planned to blame the fire on the seller and collect the insurance. Petitioner gave Ditizio a key to the theatre and directed him to get back to him regarding the final price (*id.* at 602-606). Shortly after his meeting with petitioner, Ditizio contacted Charles Allen, an experienced arsonist. They visited the theatre and agreed on a minimum price of $20,000 for the arson job (*id.* at 610-611). Ditizio later negotiated a $25,000

price for the arson, and petitioner gave him $5,000 in advance for the purchase of the necessary materials (*id.* at 612-613).

On July 15, 1977 — approximately the date of petitioner's first approach to Ditizio regarding the arson — petitioner purchased another $100,000 fire insurance policy from Triggiani. The policy provided coverage for a period of one year, beginning July 15, 1977 (C.A. App. 536). On July 25, 1977 petitioner purchased another one-year fire insurance policy from Triggiani for $125,000 in coverage (*id.* at 537-538). On the next day, he purchased from a different insurance agent[1] two additional one-year policies totalling $150,000 in coverage (*id.* at 570-572). On August 2, 1977, petitioner purchased yet another fire insurance policy, in the amount of $25,000, from Triggiani (*id.* at 539-540). As a result of these transactions, for the period between August 2 and August 14, 1977, petitioner had $500,000 in fire insurance on a building that had been purchased for $210,000 and in which he had an insurable interest of $110,000.

On August 6, Ditizio and two accomplices carried out the arson by igniting a mixture of naptha and acid, which they had spread throughout the theatre. The resulting explosion and fire caused $214,440 in damage to the theatre (C.A. App. 616-622, 840-842, 978, 1040-1045). Shortly after the fire, Ditizio approached petitioner to obtain payment for the arson. Petitioner initially refused, but ultimately paid Ditizio $15,000 (*id.* at 625-627). Petitioner subsequently retained a public adjuster to collect on the loss. The adjuster, on petitioner's behalf, mailed a series of documents in

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[1]Petitioner did not tell either insurance agent that he was also purchasing fire insurance coverage from the other agent (*id.* at 541, 547).

order to obtain reimbursement under the policies (*id.* at 957-966).[2]

ARGUMENT

1. Petitioner first contends (Pet. 6-15) that the evidence was insufficient to support a finding that the mails had been used as part of the scheme to defraud. The courts below properly rejected this contention.

Petitioner stands convicted on one count of mail fraud based on a letter (GX 12) sent to the Curley Adjustment Company by Bertram Horowitz, the public insurance adjuster retained by petitioner after the arson. Petitioner argues that the evidence of Horowitz's regular office practice to mail such documents was insufficient to establish that the particular letter was sent through the United States mail. This contention is without merit.

Horowitz testified that the normal course of business of his company was to mail such documents. Pet. App. A30. Moreover, the letter was stamped "Received" by the Curley Adjustment Bureau, thereby making clear that its transmission to the addressee was completed.[3] Thus, unlike in the

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[2]Petitioner testified that he had had no part in the arson. According to petitioner, Ditizio's brother had set the fire as revenge for the loss of a job that he blamed on petitioner (C.A. App. 1353-1354, 1525). The government's rebuttal established that Ditizio's brother had never held the job in question (*id.* at 1419-1420, 1460-1462).

[3]Petitioner also contends (Pet. 6-7) that the evidence of use of the mails was insufficient because Horowitz testified that the office's normal practice in August 1977 was to mail such documents, while the particular letter at issue here was dated January 23, 1978. This fact-bound issue does not warrant review. In any event, there is no indication that the normal practice of Horowitz's office changed in the intervening five-month period, such that the normal course of business in January 1978 would have been to dispatch such routine correspondence by special messenger or some means other than by mail. Moreover, Horowitz testified that the particular letter of January 23, 1978 was the one which "sends" the claim to the representative of Curley Adjustment Company, thereby reinforcing the conclusion that the mails were used on that specific occasion.

two district court cases upon which petitioner principally relies (Pet. 8-10), this is not a case in which there was an absence of direct evidence that the document had ever been received and the prosecution sought to prove receipt by the intended addressee by establishing an office custom that the letter would have been mailed by the sender.[4]

Petitioner also contends (Pet. 7-8, 11-14), that there is a conflict in the circuits on the question whether an office custom of mailing documents such as was shown here is sufficient evidence to sustain a conviction for mail fraud under 18 U.S.C. 1341. There is no such circuit conflict. As petitioner concedes, the Fifth, Seventh, and Ninth Circuits

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[4]The first of two these cases did not even involve a mail fraud prosecution. See *United States ex rel. Helmecke* v. *Rice*, 281 F. 326 (S.D. Tex. 1922) (discussed at Pet. 8-10). In that case, the defendant was court martialed for desertion, and his defense was that he had never been notified of his induction. There was no direct evidence that the defendant had received such a notice; the only evidence of his receipt was the testimony of the Adjutant General that it was the custom of his office to mail such notices. The district court held that in order to establish actual notice, it was necessary to show either that the particular item had been mailed or an "invariable custom" of mailing. 281 F. at 331.

In *United States* v. *Wolfson*, 322 F. Supp. 798 (D. Del. 1971), aff'd, 454 F.2d 60 (3d Cir.), cert. denied, 406 U.S. 924 (1972), (see Pet. 10, 12, 15), the mail fraud prosecution was based on receipt of a letter from the Postal Service. There was no direct evidence that the defendant received the letter, and the government sought to establish receipt by evidence of an office custom that the letter would have been mailed. The district court held that a standard of proof similar to that in *Rice* was required. 433 F. Supp. at 814.

In the third district court decision upon which petitioner relies (Pet. 10-11, 12-15), *United States* v. *Sinclair*, 433 F. Supp. 1180 (D. Del.), aff'd mem., 566 F.2d 1171 (3d Cir. 1977), the court found the evidence insufficient on Count II and sufficient on Count III. With regard to Count II, the opinion does not indicate that there was any evidence that the letter the defendant was charged with causing to be placed in the mail had been received. 433 F. Supp. at 1197. By contrast, with regard to Count III, there was persuasive evidence of receipt. *Id.* at 1197-1198.

all have held that use of the mails may be established by evidence of office custom. See Pet. 8, 12-14, citing *Stevens* v. *United States*, 306 F.2d 834, 835 (5th Cir. 1962); *United States* v. *Joyce*, 499 F.2d 9, 11 (7th Cir.), cert. denied, 419 U.S. 1031 (1974); and *United States* v. *Brackenridge*, 590 F.2d 810, 811 (9th Cir.), cert. denied, 440 U.S. 985 (1979). Indeed, these courts have adhered to that position in more recent decisions. *United States* v. *Goss*, 650 F.2d 1336, 1343 (5th Cir. 1981); *United States* v. *Ledesma*, 632 F.2d 670, 675 (7th Cir.), cert. denied, 449 U.S. 998 (1980); *United States* v. *Miller*, 676 F.2d 359, 362 (9th Cir. 1982). Petitioner contends (Pet. 8, 10-12), however, that the Third, Fourth, and Eighth Circuits have held that office custom is not sufficient to establish use of the mails. Petitioner is wrong. The Third Circuit of course held in this very case that Horowitz's testimony of a regular office practice of mailing such documents *was* sufficient evidence of use of the mails (see Pet. App. A26),[5] and the Fourth and Eighth Circuits have taken the same position. See *United States* v. *Scott*, 668 F.2d 384, 388 (8th Cir. 1981); *United States* v. *Scott*, 730 F.2d 143, 146-147 (4th Cir. 1984).[6] Accord, *United States* v. *Huber*, 603 F.2d 387, 399 (2d Cir. 1979), cert.

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[5]Petitioner's contention that the Third Circuit has taken a contrary view is based on the district court decisions in *Wolfson* and *Sinclair* discussed in note 4, *supra*. The Third Circuit's affirmances in those cases were of the defendant's convictions on counts that the district court did not set aside, and those affirmances therefore do not reflect approval of the district court's reasoning on other counts. Those decisions are in any event distinguishable, for the reasons explained in note 4, *supra*. Petitioner's reliance (Pet. 7) on *United States* v. *Hart*, 693 F.2d 286 (3d Cir. 1982), was properly rejected by the court of appeals (Pet. App. A26). In that case there was no evidence —direct or circumstantial — indicating that the document in question had been mailed. 693 F.2d at 288-289.

[6]Petitioner relies (Pet. 8, 11-12) on earlier decisions of the Fourth and Eighth Circuits. In *United States* v. *Ellicott*, 336 F.2d 868 (4th Cir. 1964), the panel majority held, over Judge Haynsworth's dissent, that

denied, 445 U.S. 927 (1980); *United States* v. *Roglieri*, 700 F.2d 883, 886 (2d Cir. 1983); *United States* v. *Gomez*, 636 F.2d 295, 297 (10th Cir. 1981). Review on this issue therefore is not warranted.[7]

2. Petitioner next contends (Pet. 15-20) that his trial counsel provided ineffective assistance in failing to investigate a possible defense and in rejecting the court's offer to give an accomplice instruction. There is no force to this contention.

After trial, the district court held an evidentiary hearing on petitioner's claims of ineffective assistance of counsel. The first of these complaints was that counsel failed to pursue the so-called "Lynch defense" — *i.e.*, petitioner's assertion that one Edward Lynch had a motive to harm petitioner and may have set the fire. It developed that defense counsel in fact had attempted to interview Lynch, but was unsuccessful. In addition, counsel had been informed by the prosecution that if an effort were made to interpose the Lynch defense, the government would present testimony from Ditizio and Allen that they had been hired

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the evidence of mailing was insufficient; but in that case, unlike here, there was direct evidence of *exceptions* to the regular office practice upon which the prosecution relied. See 336 F.2d at 870-871. In *United States* v. *Minkin*, 504 F.2d 350 (8th Cir. 1974), cert. denied, 420 U.S. 926 (1975), the court of appeals in fact affirmed the mail fraud conviction, relying in large part on evidence of the regular office practice. 504 F.2d at 352-353.

[7]Petitioner separately contends (Pet. 28-29) that the letter in question was not sufficiently related to the scheme to defraud to permit conviction under 18 U.S.C. 1341, as interpreted by this Court in *United States* v. *Maze*, 414 U.S. 395 (1974). This issue was not raised by petitioner in the court of appeals. It is, in any event, wholly without merit. Correspondence between insurance adjusters regarding the underlying fraudulent claim is beyond question integrally related to an insurance fraud. *United States* v. *Lebovitz*, 669 F.2d 894 (3d Cir.), cert. denied, 456 U.S. 929 (1982); *United States* v. *Moss*, 591 F.2d 428 (8th Cir. 1979).

by petitioner to assault Lynch (C.A. App. 1684, 1745-1746). Defense counsel also testified that he discussed the Lynch matter with petitioner, who agreed with counsel's decision to abandon the Lynch line of defense (C.A. App. 1700). Counsel's decision in these circumstances constitutes a classic example of a reasonable tactical choice that does not constitute ineffective assistance of counsel. *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 20-21; *United States* v. *Long*, 674 F.2d 848, 855 (11th Cir. 1982); *Hollenbeck* v. *Estelle*, 672 F.2d 451, 453-454 (5th Cir. 1982); *Long* v. *Brewer*, 667 F.2d 742, 744 (8th Cir. 1982).

Defense counsel's decision not to request an accomplice instruction likewise represents a studied tactical choice, not ineffective assistance of counsel. Counsel testified that, based on his experience in criminal cases, he had advised against requesting the accomplice instruction in this case because it could be a "double edged sword" that could "taint" petitioner by associating him with Ditizio, Allen, and Fardella (C.A. App. 1689, 1696, 1705-1706, 1712-1713). The district court expressly found on this basis that "there had been consideration given by counsel and the court to an accomplice charge" and that "defense counsel, having considered the matter at length among themselves, and in discussion with [petitioner] before points for charge were discussed with the court, had concluded that an accomplice charge was not in [petitioner's] interest and accordingly counsel decided against including such a charge" (Pet. App. A3; see C.A. App. 1689, 1706). Both courts below concluded that rejection of the accomplice instruction in these circumstances did not constitute ineffective assistance (Pet. App. A3-A5, A24, A27), and there is no reason for this Court to review their disposition of the matter.

This Court generally has left the determination of what constitutes ineffective assistance to the "good sense and discretion of the trial court[]." *McMann* v. *Richardson*, 397

U.S. 759, 771 (1970). Where, as here, counsel affirmatively requested the trial court not to give a particular instruction because it might not be in his client's interest and the trial court considered and acceded to that request, a reviewing court cannot lightly conclude that counsel's professional judgment so far departed from the acceptable level of competence as to constitute ineffective assistance of counsel. And in fact the court of appeals found that counsel's decision was a "permissible tactical choice" (Pet. App. A27). Moreover, petitioner has not established that there is any "reasonable probability" that the outcome of his trial would have been different if the instruction had been given. See *Strickland* v. *Washington*, slip op. 24. To the contrary, the district court made clear that it did not believe that the omission of the instruction satisfied the prejudice prong of the ineffective assistance of counsel test (Pet. App. A5).[8]

3. Petitioner argues (Pet. 20-25) that his conviction must be set aside because the jury instructions pertaining to the element of use of the mails impermissibly departed from the language used in the indictment. This claim is without merit.

Each of the six counts of the indictment charged petitioner, in pursuance of the arson and insurance fraud scheme, with "knowingly and wilfully caus[ing] to be delivered by mail" various documents relating to the insurance claims (C.A. App. 7-17). At trial the district court instructed the jury that it could convict if, among other elements of the offense, it found that petitioner "placed, or caused to be

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[8]Petitioner's additional claim of ineffectiveness based on a failure to interview witnesses (Pet. 19) was not presented to the court of appeals and therefore does not merit review by this Court. In any event, petitioner has not shown what would have been accomplished by those interviews or that there is a reasonable probability that the outcome of the trial would have been different if counsel had undertaken them.

placed in a post office or other authorized depository for mail a letter intended to be sent or delivered by the postal service" (Pet. Apap. A17).

After trial, the district court ruled that the instruction was erroneous because it permitted conviction on the basis of evidence that petitioner had caused a letter to be mailed without requiring the additional finding that petitioner had caused the letter to be delivered, as alleged in the indictment (Pet. App. A5-A19). The district court observed that its instructions would not have been erroneous if it also had instructed the jury that, based upon evidence of mailing, it could rely on a presumption that matter placed in the mail was thereafter delivered (Pet. App. A18). The district court subsequently reinstated the jury's verdict on Count 5 (Pet. App. A21-A24). The court explained that petitioner had not objected to the jury instruction and that it was in any event harmless (*id.* at A22-A23). The court found "abundant" evidence that the documents on which all of the counts were based had been placed in the mail (*id.* at A18; see also *id.* at A23); from this, the court reasoned that because the letter on which Count 5 was based had been stamped "Received" by the addressee Curley Adjustment Bureau, the jury "without question" would have found petitioner guilty beyond a reasonable doubt of causing the letter to be delivered by mail if it had been instructed to that effect (*id.* at A24).

Relying principally on this Court's decision in *Stirone* v. *United States*, 361 U.S. 212 (1960), petitioner argues (Pet. 20-25) that the district court's instruction constructively amended the indictment. This argument is wholly insubstantial. As an initial matter, although in *Stirone* the defendant objected to the jury instruction (361 U.S. at 214), petitioner made no such objection in this case. Moreover, the concern underlying the constructive amendment rule is that the petit jury might be permitted to convict on the basis

of charges that were never made by the grand jury. See, *e.g.*, *Stirone*, 361 U.S. at 217 (indictment charged exports were obstructed but instructions permitted conviction for obstructing imports of a different commodity); *United States* v. *Cusmano*, 659 F.2d 714, 719 (6th Cir. 1981) (indictment charged economic loss as extortionate threats but instructions permitted conviction for threats of physical violence); *United States* v. *Stewart Clinical Laboratory, Inc.*, 652 F.2d 804, 807 (9th Cir. 1981) (indictment charged illegal patient referral scheme but instruction permitted conviction for illegal referral of lab work). See also *Dunn* v. *United States*, 442 U.S. 100 (1979).

The distinction between the cases found to involve an impermissible constructive amendment of the indictment and this case is clear. In the cases just cited, this Court or the court of appeals perceived no necessary relationship between the two offenses — obstructing exports and obstructing imports; threats of economic loss and threats of physical violence; referral of patients and referral of lab work. But in this case, the deposit of the letter in the mail by Horowitz's company and its subsequent delivery to the Curley Adjustment Bureau were but the beginning and end of a single integrated transaction involving the use of the mails to transmit the letter.

For this reason, as the court of appeals observed, the grand jury could not have found that petitioner caused the letter to be delivered by mail without also believing that he caused it to be deposited in the mail (Pet. App. A26). Conversely, the petit jury could not have found that petitioner caused the letter to be placed in the mail without also believing that he had caused its resulting delivery. Compare *United States* v. *Lemire*, 720 F.2d 1327, 1340-1341, 1345-1346 (D.C. Cir. 1983), cert. denied, No. 83-1413 (June 4, 1984). Since there is as a practical matter no material difference between placing a letter in the mail and its delivery by

mail, there was no possibility that the petit jury convicted on the basis of an allegation never made by the grand jury. Compare, *Stirone* v. *United States*, 361 U.S. at 217-218; *United States* v. *Figueroa*, 666 F.2d 1375, 1379 n.2 (11th Cir. 1982). It is therefore not surprising that the attorney who represented petitioner at trial did not object to the instruction and the court and prosecution apparently did not perceive any defect in it when it was given.[9]

4. Finally, petitioner contends (Pet. 25-28) that the prosecutor's summation contained an unfair argument that petitioner should be convicted for the arson/insurance-fraud scheme because the three arsonists had already pleaded guilty prior to testifying at trial. This claim was properly rejected by the district court (Pet. App. A24) and the court of appeals (Pet. App. A27), and it does not warrant further review by this Court.

The three arsonists who had set the fire at the Jerry Lewis Theatre testified to their involvement in the arson and the fact that they each had entered a plea of guilty to arson or similar offenses. No objection was made to this testimony

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[9]Furthermore, the instructions taken as a whole in fact did not focus narrowly on whether petitioner caused the letter to be placed in the mail, in contradistinction to causing the delivery of the letter. Consistent with the circumstances of this case, the instructions on a number of occasions state more generally that petitioner was charged with "using" the mails or causing the mails to be "used" in connection with the arson and insurance fraud scheme. See C.A. App. 1547, 1551, 1556, 1557, 1558, 1561, 1562. Indeed, even the instruction to which petitioner objects stated that the government was required to prove that he caused the letter to be placed in a depository "to be sent or *delivered* by the postal service" (C.A. App. 1588 (emphasis added); see *id.* at 1560, 1568, 1595), and the court elsewhere stressed that the "means of delivery" must be the mails (*id.* at 1560). The court also stated that the jury would have the indictment with it during deliberations (C.A. App. 1548, 1559), and the indictment of course charged petitioner with causing the letter to be delivered. There accordingly is no reason to believe that the jury's attention was diverted from the delivery of the letter.

(Pet. App. A27). In the absence of aggravating circumstances, the failure sua sponte to give a cautionary instruction regarding evidence of a guilty plea does not require reversal. *United States* v. *Ojukwa*, 712 F.2d 1192, 1193 (7th Cir. 1983); *United States* v. *DeLucca*, 630 F.2d 294, 299 (5th Cir. 1980). Petitioner does not assert the presence of aggravating factors in this case, and, if anything, the circumstances actually mitigated any occasion for such an instruction. Petitioner and the three arsonists were not co-defendants and were not even charged with the same crime; and the arsonists could be judged guilty without necessarily finding that they had acted at petitioner's behest.

Petitioner now disavows any complaint regarding the admission of the guilty plea testimony (Pet. 26 n.3). Rather, he alleges misconduct in the prosecutor's use of that testimony in closing argument. The obvious flaw in his argument, however, is that the allegedly offensive passage (quoted at Pet. 25) contains no reference to the guilty pleas (C.A. App. 1534):

> *Mr Wehner (Prosecutor):* We brought before you the people that burned it down, and if you don't believe, based upon their testimony, based upon what Merrill told you, based upon the photographs, based upon the expert testimony that those three people burned down that theatre on August 6, 1977, then I invite you to acquit this defendant, because if they didn't burn it down, then there is no fraud.

As the district court observed when it overruled petitioner's objection, this passage merely stated that if the jury did not believe that there had been arson, it should not convict petitioner of mail fraud, because the prosecution had argued that the arson was the predicate for the fraud (*id.* at 1535). In any event, petitioner's fact-bound complaint of

prosecutorial misconduct does not warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 84-236

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOSEPH ALBERICI,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITIONER'S REPLY TO THE UNITED STATES BRIEF IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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No. 84-236

IN THE
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JOSEPH ALBERICI,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO THE UNITED STATES BRIEF IN OPPOSITION

The Government's Response to the Petition for Certiorari necessitates the following reply:

1. The Government makes two arguments in response to Petitioner's first contention. The first is that the principles established in *United States v. Helmecke v. Rice*, 281 F. 326 (S.D. Tex. 1922); *United States v. Wolfson*, 322, F. Supp. 798 (D. Del. 1971), *aff'd*, 454 F.2d 60 (3d Cir.), *cert. denied*, 406 U.S. 924 (1972); and *United States v. Sinclair*, 433 F. Supp. 1180 (D. Del.), *aff'd*, 566 F.2d 1171 (3d Cir. 1977) are limited to cases where there is no direct evidence that the document was "received" and the

prosecution seeks to prove "receipt" through evidence of office mailing practices. (Brief in Opposition, 5).[1] On this theory, the Government attempts to distinguish the present case, in which receipt was not an issue, from those cited above. Petitioner submits that those cases neither make nor turn on any such distinction, but are intended to apply to any mail fraud prosecution where use of the mails is sought to be established solely on the basis of business custom evidence.

The *Rice* decision, *supra*, was not limited to cases lacking direct proof of receipt. The Court stated that its ruling principle applied to all cases "where the fact (of mailing) is an important one." *Id.* at 331. The *Wolfson* Court later embraced the *Rice* precept and several years after that, the *Sinclair* court applied *Wolfson* in a mail fraud prosecution where the fact of mailing, not receipt, was in question.

The Government attempts to squeeze *Sinclair* into its theory by stating that in count two of that case, which was dismissed, the Opinion did not mention whether there was any evidence that the letter was received, whereas in count three, which was affirmed, there was "persuasive evidence of receipt." (Brief in Opposition, 5, n.4). The fact is, however,

1. The Government asks this Court to accept that testimony concerning office mailing customs six months prior to the period in question, along with a total failure to produce any evidence showing that the custom had not changed during this interval, is sufficient proof of mailing, because no one actually testified that things had changed. Petitioner submits that this is a sorry excuse for proof beyond a reasonable doubt, particularly where it is the only proof of mailing. It also implies an impermissible shifting of the burden of proof to the defendant. Furthermore, the Government's contention that Horowitz' use of the word "sends" reinforces the conclusion that the mails were used is wrong. The law is clear that no inference of mailing can be drawn from the word "send." *United States v. Hart*, 693 F.2d 286, 289 (3d Cir. 1982).

that the court never concerned itself with any receipt issue on either count. Count three was affirmed, not because there was "persuasive evidence of receipt," but because "The proof of mailing consisted of much more than a description by an executive of what he understood office practice to be." *Sinclair, supra,* at 1198. The Government's argument is plainly incorrect.

The second prong of the Government's Response (Brief in Opposition, 6-7) demonstrates that it has failed to grasp the crux of the first contention of the Petition for Certiorari and, based on that failure, argues that there is no conflict among the Circuits. It is not Petitioner's contention that office custom evidence, *per se,* is insufficient to establish use of the mails. Petitioner's contention is that when such evidence is the sole support of mailing, it must meet the standards discussed in *Wolfson* and *Sinclair, supra,* in order to be sufficient. On this point, there is certainly a conflict among the Circuits. (Pet. 6-15).

The language of the Fourth and Eighth Circuits in *United States v. Ellicott,* 366 F.2d 868 (4th Cir. 1964) and *United States v. Minkin,* 504 F.2d 350 (8th Cir. 1984), *cert. denied,* 420 U.S. 926 (1975), as discussed in the Petition, clearly reflects a position compatible with *Wolfson* and *Sinclair* and incompatible with *United States v. Joyce,* 499 F.2d (7th Cir.), *cert. denied,* 419 U.S. 1031 (1974) and its contemporaries. (See, Pet. 11-13). The cases cited by the Government to show otherwise are not on point.[2]

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2. In *United States v. Scott,* 730 F.2d 143 (4th Cir. 1984), the Fourth Circuit merely states that proof of mailing may be established by evidence of mailing practices. *Id.* at 147. However, that is not the issue in this case. The issue concerns what that proof must consist of when it is the only evidence of mailing. In *United States v. Scott,* 668 F.2d 384 (8th Cir. 1981), the witness himself regularly

2. In response to Petitioner's second contention, the Government argues that the failure of Petitioner's trial counsel to investigate the "Lynch" matter was a permissible tactical choice and not ineffective assistance of counsel. (Brief in Opposition, 7-9). In support of this argument, the Government cities trial counsel's unsuccessful attempt to contact Lynch and counsel's claim that he had been informed by the prosecutor that if the Lynch defense was asserted, Allen and DiTizio would testify that Petitioner had hired them to assault Lynch. (Brief in Opposition, 7-8).

The Government ignores the fact that Petitioner had also given trial counsel the name and number of a former Lynch employee, Richard Galli, who was ready and willing to assist in the investigation, and who would have testified that Lynch did indeed have a motive to set the fire. (Pet. 16-18). Counsel never attempted to contact Galli.

Counsel's decision that the Lynch defense would back-fire in court because of the prosecution's intention was premature, to say the least. Such a determination could not properly be made until after an investigation was completed, and its results analyzed and weighed carefully against the risks. Counsel's total failure to do this, approved by the Court of Appeals, clearly conflicted with the principles stated in the Third Circuit's holding of *United States v. Baynes*, 687 F.2d 659 (3d Cir. 1982).

With respect to trial counsel's rejection of an accomplice charge, the Government contends that both courts below decided that counsel was not ineffective and this Court generally does not review such

NOTES *(Continued)*

picked up the letters in question at his post office box and was therefore directly involved in the mailing custom he testified about. *Id.* at 388. Such proof is consonate with Petitioner's view.

decisions. (Brief in Opposition, 8). In fact, the district court specifically declined to decide the issue (App. 5) and the decision of the Court of Appeals was of the most cursory fashion. The question thus stands in need of this Court's review.

The only direct evidence of Petitioner's involvement in this case came from DiTizio, an alleged accomplice, whose testimony was highly suspect. In these circumstances, courts uniformly hold that an accomplice instruction must be given if requested. *See*, e.g., *Tillery v. United States*, 411 F.2d 644, 648 (5th Cir. 1969). The district court offered to give the charge, and at the post-trail hearing stated, "I cannot . . . fashion for myself a persuasive reason why an accomplice charge wouldn't have been helpful to (Petitioner)." (App. 4, 5). The answer is that there was no persuasive reason.

Finally, Petitioner submits that he has satisfied the requirement of *Strickland v. Washington*, No. 82-1554 (May 14, 1984) that there be "a reasonable probability" that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 24. DiTizio's credibility was called into serious question on cross-examination and by the contrasting testimony of his cohorts. There was at least a reasonable probability that an accomplice instruction would have finally tipped the scales against him. This, together with the Lynch defense, would very likely have changed the outcome of the trial.

3. The Government argues that the district court's instructions, which focused only on "deposit" and not on "delivery," were not a constructive amendment of the indictment because there is "no material difference between placing a letter in the mail and its delivery by mail," and therefore, "there was no

possibility that the petite jury convicted on the basis of an allegation never made by the grand jury." (Brief in Opposition, 11-12).

This is precisely the argument made to and rejected by the district court. (App. A, 7-8). That court specifically found that there is a significant difference between these terms, that they constitute separate offenses under the statute, and that they are integral parts of the indictment. (App. A).[3] The court then found that its instruction seriously altered this ingredient of the offense charged in the indictment. In other words, there was a constructive amendment.

When the district court reinstated count five, it did not alter this finding. It reinstated count five because it felt that *even though* there was a constructive amendment, it was "harmless error." (App. A, 22, 24).[4] Petitioner submits that there is no such thing as a harmless constructive amendment.

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3. Other courts have held the same: *United States v. Klingbeil*, 410 F. Supp. 1235 (W.D. Wis. 1976); *United States v. Richman*, 369 F.2d 465 (7th Cir. 1966). The close relation of these terms to a single transaction only magnifies the court's duty to keep them distinct. As the Government points out, the district court did not instruct the jury that delivery could be presumed from deposit, and thus, failed to bridge the gap.

4. Petitioner submits that the strength or weakness of the evidence on count five has no bearing on the question of whether there was a constructive amendment of the indictment. That question entails an examination of two factors; the indictment and the instructions. The force of evidence relates only to the separate "harmless error" question, and this Court should not allow the Government or the Court of Appeals to confuse the two. An examination of the charges in the indictment and the court's instructions in this case, demonstrates that the district court focused on deposit, and not on delivery. The cases state that these are different offenses. (Pet. 23). The magnitude of the error is therefore obvious.

The failure of the trial counsel to object to the fatal instructions was irrelevant, because a constructive amendment is prejudicial *per se* and thus plain error. It has been held that plain error is that which causes a substantial miscarriage of justice. *United States v. Lemire*, 720 F.2d 1327, 1343 n. 25, (D.C. Cir. 1982), *cert. denied*, No. 83-1413 (June 4, 1984). The error herein violated Petitioner's fundamental right to be tried only on criminal charges brought by a grand jury. As a result of the district court's instructions, Petitioner was forced to answer for a crime he was not charged with. It is hard to imagine a more substantial miscarriage of justice. This Court in *Stirone v. United States*, 361 U.S. 212 (1960), has held that "Deprivation of such a basic right is far too serious to be dismissed as harmless error." *Id.* at 217.

Thus, according to *Stirone*, a constructive amendment is never harmless, but always prejudicial. Any possibility of harmless error is therefore automatically foreclosed by the finding of a constructive amendment. To the extent that the courts below and the Government assert to the contrary, they are in fatal conflict with *Stirone*.

4. The Government's response to Petitioner's fourth contention is that the portion of the prosecution's speech objected to by Petitioner (quoted at Pet. 25) did not amount to a suggestion that the guilty pleas of the prosecution's witnesses were evidence of Petitioner's guilt, because no direct reference was made to the guilty pleas. (Brief in Opposition, 13). Petitioner submits that while the words "guilty plea" were not used, the reference was unmistakable.

A realistic review of the closing argument demonstrates that the prosecution was not trying to do Petitioner any favors when it made the speech in

question. It was trying to secure a conviction. The clear import of the prosecution's words was that if its witnesses had committed the predicate offense (arson), then there was fraud. (Pet. 25). It takes no great effort to realize that what this meant was that the witnesses had actually pleaded guilty to the predicate offense and therefore, Petitioner must have committed the fraud.

The failure of the district court to give a cautionary instruction on such comment was plain error even by the Government's proposed standard. (Brief in Opposition, 13). Aggravating circumstances such as trial counsel's inexcusable failure to pursue the "Lynch" matter, which would have indicated that Lynch set the fire, counsel's refusal of an accomplice instruction, which would have warned the jury to regard the witnesses' testimony with suspicion, and the district court's failure to give the correct instructions on the "delivery" element of mail fraud, combined to raise the failure to give a cautionary instruction to the level of plain error.

5. The Government's response to Petitioner's final contention is simply that correspondence between insurance adjusters regarding an underlying fraudulent claim is related to the insurance fraud. (Brief in Opposition, 7, at n.7). This general statement completely ignores the circumstances of the case at bar as discussed in the Petition.

The subject matter of the letter underlying the conviction in this case involves nothing more than a squabble between two insurance Adjusters over what was damaged in the fire. It did not concern the nature of the fire, or its origin, which were factors related to the alleged scheme to defraud. The proofs of loss were not submitted to Curley Adjustment Company. Furthermore, the correspondence occurred at

a time when one of the companies (Curley) had ceased to represent its client (Safeguard) and Petitioner had lost his right to collect. (Pet. 28, 29).

Under those circumstances, the letter could not have played a "significant part" in enabling Petitioner to collect insurance proceeds as required by this Court in *United States v. Maze,* 414 U.S. 395 (1974), and the decision of the Third Circuit thus conflicts with the spirit of the *Maze* Opinion.

CONCLUSION

For the reasons advanced in the main brief, as extended by this Reply Brief, Petitioner's conviction and sentence should be reversed.

November, 1984

Respectfully submitted,

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